TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 58

THE UNITED STATES OF AMERICA, APPELLANT

vs.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

FILED JUNE 1, 1943

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 83

THE UNITED STATES OF AMERICA, APPELLANT

vs.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

INDEX

1 In District Court of the United States, District of Massachusetts.

No. 16021, Criminal Docket

THE UNITED STATES OF AMERICA, BY INDICTMENT

v.

JACOB HARK AND HYMAN YAFFEE

Indictment

(Returned into Court by Grand Jury and filed December 21, 1942)

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said District, on the second Tuesday of September in the year of our Lord one thousand nine hundred and forty-two.

The Jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that—

1. Jacob Hark, of Boston, in the District of Massachusetts, and Hyman Yaffee, of Newton in the district of Massachusetts, are made the defendants herein. Said defendants at all times hereinafter referred to, were and they are copartners doing business as Liberty Beef Company, in the City of Boston, District of Massachusetts, and, at all times hereinafter referred to, the said defendants were engaged at said place of business in the sale at wholesale of beef and veal carcasses and wholesale cuts thereof.

2. On or about the nineteenth day of June in the year
2 nineteen hundred and forty-two, the Office of Price Administration issued Maximum Price Regulation No. 169, hereinafter referred to as the Regulation, which became effective as to wholesalers on June 20, 1942. The said Regulation prescribed maximum prices for the sale of beef and veal carcasses and wholesale cuts thereof.

3. At all times hereinafter referred to, said Regulation, as amended, was effective under the provisions of Section 2 of the Act of Congress known as the Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress), approved January 30, 1942.

4. At all times hereinafter referred to, said Maximum Price Regulation No. 169 (Section 1364.51) provided that no person shall sell or deliver any beef or veal carcass or wholesale cut, and no person in the course of trade or business shall buy or receive any beef or veal carcass or wholesale cut at a price higher than the maximum price permitted by Section 1364.52; and no

person shall agree, offer, solicit, or attempt to do any of the foregoing.

5. At all times hereinafter referred to, the sale and delivery of beef and veal carcasses and wholesale cuts thereof, were matters within the jurisdiction of the Office of Price Administration.

6. At all times hereinafter referred to, the Office of Price Administration was an agency of the United States by virtue of the provisions of Section 201 of the aforesaid Emergency Price Control Act of 1942.

7. At all times hereinafter referred to, the maximum prices for the sale of beef and veal carcasses and wholesale cuts thereof were determined under Section 1364.52 of said Maximum Price Regulation No. 169, as amended.

8. The investigation of the matters charged in this indictment was begun during the term beginning with the second Tuesday of September in the year nineteen hundred and forty-two, and the said Grand Jury was authorized to sit during the term beginning with the first Tuesday of December in the year nineteen hundred and forty-two, by order of a District Court judge for the District of Massachusetts, for the purpose of finishing investigations begun but not finished during its original term.

9. On or about the 21st day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly and wilfully sell and deliver wholesale cuts of
3 beef to Conrad De Rora, of Boston, Massachusetts, at prices higher than the maximum prices, as determined under Section 1364.52 of said Regulation No. 169, as amended; that is to say, the said defendants did sell and deliver to the said Conrad De Rosa ten hundred and fifteen (1015) pounds of hindquarters of beef, the grade of which is to your Grand Jurors unknown, for a price of two hundred seventy-four dollars and five cents ($274.05).

COUNT TWO

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8, inclusive, in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-second day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver wholesale cuts of beef to Oreste Frasso, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section

1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Oreste Frasso three hindquarters of beef, weighing a total of four hundred twenty (420) pounds, the grade of which is to your Grand Jurors unknown, for a price of one hundred twenty-six dollars and sixty-two cents ($126.62).

COUNT THREE

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8, inclusive, in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-second day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Felice Moscordini, of Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Felice Moscordini two hindquarters of beef, weighing a total of two hundred eighty-eight (288) pounds; the grade of which is to your Grand Jurors unknown, for a price of eighty-two dollars and eight cents ($82.08).

4 COUNT FOUR

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the first day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Joseph Cerra, of Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Joseph Cerra two hindquarters of beef, weighing a total of three hundred fifty-six (356) pounds, the grade of which is to your Grand Jurors unknown, for a price of ninety-eight dollars and two cents ($98.02).

COUNT FIVE

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs

1 to 8, inclusive, in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

COUNT SIX

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8, inclusive, in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the eighth day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Joseph Cerra, of Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Joseph Cerra two hindquarters of beef, weighing a total of three hundred fifty-one (351) pounds, the grade of which is to your Grand Jurors unknown, for a price of one hundred one dollars and seventy-nine cents ($101.79).

COUNT SEVEN

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8, inclusive, in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-ninth day of September in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Edward Iandoli, doing business as Home Savings Market, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Edward Iandoli four hindquarters of beef, weighing a total of six hundred fourteen (614) pounds, the grade of which is to your Grand Jurors unknown, for a price of one hundred seventy-eight dollars and six cents ($178.06).

COUNT EIGHT

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the eighth day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Edward Iandoli, doing business as Home Savings Market, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Edward Iandoli four hindquarters of beef, weighing a total of six hundred fifteen (615) pounds, the grade of which is to your Grand Jurors unknown, for a price of one hundred sixty-nine dollars and thirteen cents ($169.13).

COUNT NINE

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8, inclusive, in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the thirteenth day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Edward Iandoli, doing business as Home Savings Market, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and
6 deliver to Edward Iandoli two hindquarters of beef, weighing a total of three hundred sixty-seven (367) pounds, the grade of which is to your Grand Jurors unknown, for a price of ninety-nine dollars and nine cents ($99.09).

COUNT TEN

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-second day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Edward Iandoli, doing business as Home Savings Market, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did

sell and deliver to Edward Iandoli two hindquarters of beef, weighing a total of three hundred twenty-six (326) pounds, the grade of which is to your Grand Jurors unknown, for a price of ninety-nine dollars and forty-three cents ($99.43).

COUNT ELEVEN

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-seventh day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Frank Viscione, doing business as Frank's Market, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Frank Viscione three rump and rounds, a total weight of three hundred thirty-two (332) pounds, the grade of which is to your Grand Jurors unknown, for a price of eighty-seven dollars and ninety-eight cents ($87.98).

COUNT TWELVE

And the Jurors aforesaid, upon their oath aforesaid,
7 further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the second day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Stephen Pino and Orazio Pino, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Stephen Pino and Orazio Pino two rump and round and loins, a total weight of two hundred and ninety (290) pounds, the grade of which is to your Grand Jurors unknown, for a price of seventy-nine dollars and seventy-five cents ($79.75).

COUNT THIRTEEN

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs

1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the sixteenth day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Stephen Pino and Orazio Pino, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Stephen Pino and Orazio Pino, two rump and round and loins, a total weight of two hundred eighty (280) pounds, the grade of which is to your Grand Jurors unknown, for a price of seventy-five dollars and sixty cents ($75.60).

COUNT FOURTEEN

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-second day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to
8 Stephen Pino and Orazio Pino, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Stephen Pino and Orazio Pino two rump and round and loins, a total weight of three hundred twenty-two (322) pounds, the grade of which is to your Grand Jurors unknown, for a price of eighty-eight dollars and fifty-five cents ($88.55).

COUNT FIFTEEN

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fifteenth day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to John Pagano, doing business as John's Market, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined

under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to John Pagano two hindquarters of beef, weighing a total of two hundred seventy-one (271) pounds, the grade of which is to your Grand Jurors unknown, for a price of sixty-five dollars and three cents ($65.03).

COUNT SIXTEEN

And the Jurors aforesaid, upon their oath aforesaid further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the sixteenth day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to John Pagano, doing business as John's Market, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to John Pagano two hindquarters of beef, weighing a total of two hundred eighty-two (282) pounds, the grade of which is to your Grand Jurors unknown, for a price of seventy dollars and fifty cents ($70.50).

9 COUNT SEVENTEEN

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-second day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly and wilfully sell and deliver to John Pagano, doing business as John's Market, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to John Pagano two hindquarters of beef, weighing a total of two hundred eighty-three (283) pounds, the grade of which is to your Grand Jurors unknown, for a price of seventy-two dollars and eighty-one cents ($72.81).

COUNT EIGHTEEN

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs

1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-seventh day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly and wilfully sell and deliver to John Pagano, doing business as John's Market, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to John Pagano rump and rounds, a total weight of three hundred four (304) pounds, the grade of which is to your Grand Jurors unknown, for a price of eighty-two dollars and eight cents ($82.08).

COUNT NINETEEN

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-ninth day of October in the year
10 nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly and wilfully sell and deliver to John Pagano, doing business as John's Market, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to John Pagano two hindquarters of beef, weighing a total of two hundred ninety-four (294) pounds, the grade of which is to your Grand Jurors unknown, for a price of seventy-three dollars and fifty cents ($73.50).

COUNT TWENTY

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the first day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Baleslawa Recko, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said de-

fendants did sell and deliver to Baleslawa Recko one hindquarters of beef, weighing three hundred and two (302) pounds, the grade of which is to your Grand Jurors unknown, for a price of seventy-eight dollars and fifty-two cents ($78.52).

COUNT TWENTY-ONE

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8, inclusive, in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the ninth day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Baleslawa Recko, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Baleslawa Recko two
11 hindquarters of beef, weighing a total of three hundred forty-four (344) pounds, the grade of which is to your Grand Jurors unknown, for a price of ninety-four dollars and sixty cents ($94.60).

COUNT TWENTY-TWO

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twentieth day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Baleslawa Recko, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices, as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Baleslawa Recko two hindquarters of beef, weighing a total of four hundred fifteen (415) pounds, the grade of which is to your Grand Jurors unknown, for a price of one hundred fourteen dollars and thirteen cents ($114.13).

COUNT TWENTY-THREE

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs

1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Baleslawa Recko, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Baleslawa Recko two hindquarters of beef, weighing a total of three hundred sixty-two (362) pounds, the grade of which is to your Grand Jurors unknown, for a price of ninety-nine dollars and fifty five cents ($99.55).

12 COUNT TWENTY-FOUR

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the eighth day of October in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Thomas Zacco, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Thomas Zacco four hindquarters of beef, weighing a total of five hundred twenty-two (522) pounds, the grade of which is to your Grand Jurors unknown, for a price of forty-one dollars and seventy-six cents ($41.76).

COUNT TWENTY-FIVE

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 8 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the thirteenth day of November in the year nineteen hundred and forty-two, at Boston, in the District of Massachusetts, the said Jacob Hark and Hyman Yaffee did unlawfully, knowingly, and wilfully sell and deliver to Thomas Zacco, Boston, Massachusetts, wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.52 of the said Regulation, as amended; that is to say, the said defendants did sell and deliver to Thomas Zacco one hind quarter of beef, weighing two hundred eighty-one (281) pounds, the grade of

which is to your Grand Jurors unknown, for a price of thirty-three dollars and seventy-two cents ($33.72).

A True Bill.

DANIEL E. WALSH,
Foreman of the Grand Jury.

JOSEPH J. GOTTLIEB,
Assistant United States Attorney for the District of Massachusetts.

District of Massachusetts, December 21, 1942. Returned into the District Court by the Grand Jurors and filed. Arthur M. Brown, Deputy Clerk.

In United States District Court

Arraignment and plea

This indictment was presented by the grand jury at the December Term of this Court, A. D., 1942, when, to wit, December 22, 1942, the Honorable Arthur D. Healey, District Judge, sitting, the said defendants Jacob Hark and Hyman Yaffee were set to the bar and having waived the reading of the indictment, upon being inquired of said severally that thereof they were not guilty.

13

In United States District Court

Motion of Defendant, Jacob Hark, to quash indictment

Filed January 4, 1943

Now comes the defendant, Jacob Hark, through his counsel, and moves to quash the above indictment upon the following grounds:

1. That the indictment and neither count thereof sets forth a criminal offense against the United States.

2. That the indictment and neither count thereof sets forth an offense against the United States with the certainty, particularity and definiteness required by the rules of criminal procedure and pleading.

3. That the allegations in the indictment and each and every count thereof are in violation of the defendant's constitutional rights under the Fifth Amendment to the Constitution of the United States in that upon either conviction or acquittal on any or all of the counts therein he would not be able to plead former jeopardy.

4. That the indictment and each and every count thereof is in violation of the Fifth Amendment to the Constitution of the

United States in that the Regulation alleged to have been violated compels the defendant in a criminal case to be a witness against himself, that is to say, that the defendant is required to fix the maximum price permitted by Section 1364.52 of Maximum Price Regulation No. 169 which forms the basis or standard upon which the indictment and each and every count thereof is predicated in which it is alleged that the defendant sold and delivered wholesale cuts of beef at prices higher than said maximum as determined under Section 1364.52 of said Regulation.

5. That the method established by the Price Administrator of fixing the maximum price at which beef and veal carcasses and wholesale cuts thereof could be sold or delivered as provided by Maximum Price Regulation No. 169 is arbitrary in that a person might be compelled to sell or deliver such beef and veal carcasses and wholesale cuts thereof at a price below the actual cost thereof and effecting a confiscation of property without due process of law.

14 6. That the method established by the Price Administrator of fixing the maximum price at which beef and veal carcasses and wholesale cuts thereof are permitted to be sold or delivered as provided by Section 1364.52 of Maximum Price Regulation No. 169 is unfair and inequitable.

7. That the Act of Congress known as the Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress) is in violation of the power of Congress to make and enact laws under Section 1 of Article 1 of the Constitution of the United States.

8. That the Act of Congress known as the Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress) goes beyond the constitutional authority of Congress in that by specific reference to enumerated subjects set out in Section 1 of said Act (Public Law No. 421, 77th Congress) it seeks to establish legislation founded upon indefinite or indeterminable standards which could not be known or predicted at the time of the enactment of said Act and not so sufficiently established as to support an indictment for a criminal offense under any of its terms or any regulation issued thereunder.

9. That the Regulations and Orders of the Office of Price Administration and the Price Administrator, upon which the indictment and each and every count thereof is predicated, are in violation of the power of Congress to make and enact laws of the United States.

10. That the Act of Congress known as the Emergency Price Control Act of 1942 is in violation of Section 1 of Article 1 of the Constitution of the United States in that it purports to authorize the Price Administrator to pass a prohibitory law, penal in nature.

11. That the Regulations and Orders upon which the indictment and each and every count thereof is predicated, are dependent upon determinations of fact which determinations are not shown as required by law.

12. That Maximum Price Regulation No. 169 issued by the Price Administrator is bases upon a statement of purported considerations representing the opinion of the Price Administrator and is not in conformity with the Act of Congress known as the Emergency Price Control Act of 1942.

13. That Maximum Price Regulation No. 169 issued by the Price Administrator is bases upon a statement of purported considerations representing the opinion of the Price Administrator and is not supported by a finding or findings of fact which are sustained by any evidence and is insufficient to support a conviction upon an indictment setting forth the violation of said Regulation as constituting a criminal offense.

14. That the findings of fact upon which the punitive regulations are bases are not findings of fact to be determined by the Price Administrator but are required to be made by the defendant against whom a conviction is sought.

15. That the method of procedure established by the Price Administrator in finding the facts fixing the maximum price of beef or veal carcasses or wholesale cuts thereof and promulgating rules and regulations thereunder, the violation of which shall be a criminal offense, is in violation of the rights of the defendant under the Fifth Amendment to the Constitution of the United States.

16. That the Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress) in so far as it purports to confer upon the Price Administrator, appointed under Section 201 of Title II of said Act, authority to establish a maximum price or maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid Act is void, because of unconstitutional delegation of legislative power.

17. That the indictment and each and every count thereof alleges that the defendant sold and delivered wholesale cuts of beef at prices higher than the maximum price determined under Section 1364.52 of Maximum Price Regulation No. 169 and in instances where the defendant has no sales of certain grades of beef or wholesale cuts thereof during the period March 16 to March 28, 1942, he is required to use a price established by competitors; that the standard established or sought to be established by the Office of Price Administration and the Price Administrator is not certain, definite, and uniform under said Regulation and the defendant is called upon to answer an indictment which differs in standard from other persons engaged in the same busi-

ness with him and has the effect of requiring him to answer an indictment bases upon a standard which to certain sellers of wholesale cuts of beef may constitute a crime and which to competitors doing the same acts constitutes no crime.

18. That the indictment and neither count thereof sets forth sufficient facts to show that the Act of Congress known as the Emergency Price Control Act of 1942.

19. That the indictment and neither count thereof sets forth sufficient facts to show a violation of a regulation purported to have been made by the Price Administrator acting under the authority vested in him under the Act of Congress known as the Emergency Price Control Act of 1942.

20. That the indictment and neither count thereof sets forth sufficient facts to show that the Act of Congress known as the Emergency Price Control Act of 1942 has been violated to the extent that the defendant is answerable to a criminal indictment.

21. That the indictment and neither count thereof sets forth sufficient facts to show that a regulation purported to have been made by the Price Administrator acting under the authority vested in him under the Act of Congress known as the Emergency Price Control Act of 1942 has been violated to the extent of making the defendant answerable to a criminal indictment.

22. That paragraphs 5, 6, and 7 of the indictment, reaffirmed, realleged, and incorporated by reference in each and every count therein, charge no criminal acts but set forth opinions and conclusions of the pleader as to what the law is and therefore adds nothing to any of the counts in the indictment so as to make each and every count set forth a criminal offence against the United States.

23. That the indictment and neither count thereof sets forth sufficient facts to show the grade of the wholesale cuts of beef which the defendant is alleged to have sold and delivered thereby not enabling the defendant to figure out the maximum price of each respective sale and delivery as determined under Section 1364.52 of Maximum Price Regulation No. 169 and not permitting the defendant to apprise himself of whether the prices of the alleged sales and deliveries were in fact higher than the maximum prices permitted.

23. That no price unit is set forth in the indictment or any count thereof so that the defendant is unable to ascertain what the maximum price for each alleged sale and delivery in the various counts of the indictment should be for the respective grades of wholesale cuts of beef and leaves to the government to prosecute on matters not specified in the indictment or any count thereof.

25. That the indictment and each and every count thereof purportedly alleges that there was a violation of Maximum Price Regulation No. 169 (Section 1364.51) in that the defendant did unlawfully, knowingly, and willingly sell and deliver
17 wholesale cuts of beef . . . at prices higher than the maximum prices, as defined under Section 1364.52 of said Maximum Price Regulation No. 169, as amended; that at the time the Indictment was returned said Section 1364.51 and 1364.52 were not in force and effect the same having been revoked or repealed by the Price Administrator on or about December 11, 1942 which was prior to the date of the return of the indictment herein by the Grand Jury and therefore the indictment sets forth no crime against the United States as of the date of the indictment.

JACOB HARK
(By his attorneys),
LEONARD PORETSKY

In United States District Court

Motion to quash

Filed January 4, 1943

The defendant, Jacob Hark, moves that the indictment and the twenty-five counts thereof be quashed for the following reasons:

1. The allegations of fact necessary to constitute a crime are insufficient, uncertain and are not set forth with precision and certainty.

2. The allegations in each and every count in the indictment failed to state that the alleged sales were wholesale.

3. All of the twenty-five counts in the indictment are duplicitous, in that each count charges the commission of more than one offense.

4. There is no allegation, in any of the twenty-five counts in the indictment, that Regulation 169 was approved as required by law.

5. There is no allegation in any of the twenty-five counts in the indictment that a warning was given, as required by law, before any criminal action was taken.

6. The said act, in so far as it creates offenses and imposes penalties, is in violation of the Constitution of the United States and an infringement of the rights of the defendant.

(By his attorney),
(Signed) WILLIAM C. MAGUIRE
William C. Maguire

18 In United States District Court

Motion of defendant, Hyman Yaffee, to quash indictment

Filed January 4, 1943

Now comes the defendant, Hyman Yaffee, through his counsel, and moves to quash the above indictment upon the following grounds:

1. That the indictment and neither count thereof sets forth a criminal offense against the United States.

2. That the indictment and neither count thereof sets forth an offense against the United States with the certainty, particularity and definiteness required by the rules of criminal procedure and pleading.

3. That the allegations in the indictment and each and every count thereof are in violation of the defendant's constitutional rights under the Fifth Amendment to the Constitution of the United States in that upon either conviction or acquittal on any or all of the counts therein he would not be able to plead former jeopardy.

4. That the indictment and each and every count thereof is in violation of the Fifth Amendment to the Constitution of the United States in that the Regulation alleged to have been violated compels the defendant in a criminal case to be a witness against himself, that is to say, that the defendant is required to fix the maximum price permitted by Section 1364.52 of Maximum Price Regulation No. 169 which forms the basis or standard upon which the indictment and each and every count thereof is predicted in which it is alleged that the defendant sold and delivered wholesale cuts of beef at prices higher than said maximum as determined under Section 1364.52 of said Regulation.

5. That the method established by the Price Administrator of fixing the maximum price at which beef and veal carcasses and wholesale cuts thereof could be sold or delivered as provided by Maximum Price Regulation No. 169 is arbitrary in that a person might be compelled to sell or deliver such beef and veal carcasses and wholesale cuts thereof at a price below the actual
19 cost thereof, and effecting a confiscation of property without due process of law.

6. That the method established by the Price Administrator of fixing the maximum price at which beef and veal carcasses and wholesale cuts thereof are permitted to be sold or delivered as provided by Section 1364.52 of Maximum Price Regulation No. 169 is unfair and inequitable.

7. That the Act of Congress known as the Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress) is in violation of the power of Congress to make and enact laws under Section 1 of Article I of the Constitution of the United States.

8. That the Act of Congress known as the Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress) goes beyond the constitutional authority of Congress in that by specific reference to enumerated subjects set out in Section 1 of said Act (Public Law No. 421, 77th Congress) it seeks to establish legislation founded upon indefinite or indeterminable standards which could not be known or predicted at the time of the enactment of said Act and not so sufficiently established as to support an indictment for a criminal offense under any of its terms or any regulation issued thereunder.

9. That the Regulations and Orders of the Office of Price Administration and the Price Administrator, upon which the indictment and each and every count thereof is predicated, are in violation of the power of Congress to make and enact laws of the United States under Section 1 of Article I of the Constitution of the United States.

10. That the Act of Congress known as the Emergency Price Control Act of 1942 is in violation of Section 1 of Article I of the Constitution of the United States in that it purports to authorize the Price Administrator to pass a prohibitory law, penal in nature.

11. That the Regulations and Orders upon which the indictment and each and every count thereof is predicated are dependent upon determinations of fact, which determinations are not shown as required by law.

12. That Maximum Price Regulation No. 169 issued by the Price Administrator is based upon a statement of purported considerations representing the opinion of the Price Administrator and is not in conformity with the Act of Congress known as the Emergency Price Control Act of 1942.

13. That Maximum Price Regulation No. 169 issued by the Price Administrator is based upon a statement of purported considerations representing the opinion of the Price Administrator and is not supported by a finding or findings of fact which are sustained by any evidence and is insufficient to support a conviction upon an indictment setting forth the violation of said Regulation as constituting a criminal offense.

14. That the findings of fact upon which the punitive regulations are based are not findings of fact to be determined by the Price Administrator but are required to be made by the defendant against whom a conviction is sought.

15. That the method of procedure established by the Price Administrator in finding the facts fixing the maximum price of beef or veal carcasses or wholesale cuts thereof and promulgating rules and regulations thereunder, the violation of which shall be a criminal offense, is in violation of the rights of the defendant under the Fifth Amendment to the Constitution of the United States.

16. The Emergency Price Control Act of 1942. (Public Law No. 421, 77th Congress) in so far as it purports to confer upon the Price Administrator, appointed under Section 201 of Title II of said Act, authority to establish a maximum price or maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid Act is void because of unconstitutional delegation of legislative power.

17. That the indictment and each and every count thereof alleges that the defendant sold and delivered wholesale cuts of beef at prices higher than the maximum price determined under Section 1364.52 of Maximum Price Regulation No. 169 and in instances where the defendant has no sales of certain grades of beef or wholesale cuts thereof during the period March 16 to March 28, 1942 he is required to use a price established by competitors; that the standard established or sought to be established by the Office of Price Administration and the Price Administrator is not certain, definite and uniform under said Regulation and the defendant is called upon to answer an indictment which differs in standard from other persons engaged in the same business with him and has the effect of requiring him to answer an indictment based upon a standard which to certain sellers of wholesale cuts of beef may constitute a crime and which to competitors doing the same acts constitutes no crime.

21

18. That the indictment and neither count thereof sets forth sufficient facts to show a violation of the Act of Congress known as the Emergency Price Control Act of 1942.

19. That the indictment and neither count thereof sets forth sufficient facts to show a violation of a regulation purported to have been made by the Price Administrator acting under the authority vested in him under the Act of Congress known as the Emergency Price Control Act of 1942.

20. That the indictment and neither count thereof sets forth sufficient facts to show that the Act of Congress known as the Emergency Price Control Act of 1942 has been violated to the extent that the defendant is answerable to a criminal indictment.

21. That the indictment and neither count thereof sets forth sufficient facts to show that a regulation purported to have been

made by the Price Administrator acting under the authority vested in him under the Act of Congress known as the Emergency Price Control Act of 1942 has been violated to the extent of making the defendant answerable to a criminal indictment.

22. That paragraphs 5, 6, and 7 of the indictment, reaffirmed, realleged and incorporated by reference in each and every count therein, charge no criminal acts but set forth opinions and conclusions of the pleader as to what the law is and therefore adds nothing to any of the counts in the indictment so as to make each and every count set forth a criminal offense against the United States.

22 23. That the indictment and neither count thereof sets forth sufficient facts to show the grade of the wholesale cuts of beef which the defendant is alleged to have sold and delivered thereby not enabling the defendant to figure out the maximum price of each respective sale and delivery as determined under Section 1364.52 of Maximum Price Regulation No. 169 and not permitting the defendant to apprise himself of whether the prices of the alleged sales and deliveries were in fact higher than the maximum prices permitted.

24. That no price unit is set forth in the indictment or any count thereof so that the defendant is unable to ascertain what the maximum price of each alleged sale and delivery in the various counts of the indictment should be for the respective grades of wholesale cuts of beef and leaves to the government to prosecute on matters not specified in the indictment or any count thereof.

25. That the indictment and each and every count thereof purportedly alleges that there was a violation of Maximum Price Regulation No. 169 (Section 1364.51) in that the defendant did unlawfully, knowingly, and willfully sell and deliver wholesale cuts of beef . . . at prices higher than the maximum prices, as defined under Section 1364.52 of said Maximum Price Regulation No. 169, as amended; that at the time the indictment was returned said Sections 1364.51 and 1364.52 were not in force and effect the same having been revoked or repealed by the Price Administrator on or about December 11, 1942, said revocation or repeal becoming effective on December 16, 1942, which was prior to the date of the return of the indictment herein by the Grand Jury and therefore the indictment sets forth no crime against the United States as of the date of the indictment.

HYMAN YAFFEE,
(By his attorneys),
(Signed) LEONARD PORETSKY.
(Signed) JOHN H. BACKUS.

23 In United States District Court

Plea in abatement of the Defendant Jacob Hark

Filed January 4, 1943

Now comes the defendant Jacob Hark, through his counsel, and pleads in objection to the indictment and each and every count thereof as follows:

1. That he is informed and believes that evidence was obtained in violation of his rights under the Fourth Amendment to the Constitution of the United States in that an agent or agents of the Office of Price Administration acting without a search warrant entered the premises of the defendant and searched his books, records, and papers unlawfully and obtained evidence which was later presented to the Grand Jury upon which this indictment was returned.

2. That if the Office of Price Administration or any agent or agents thereof had the lawful right to search, examine, or seize the books, records, and papers of the defendant in violation of the Fourth Amendment to the Constitution of the United States, the defendant under the provisions of the Act of Congress known as the Emergency Price Control Act of 1942 (Pub. Law No. 421, 77th Congress), Section 202, paragraph b, was granted immunity from prosecution.

3. That the indictment and each and every count thereof is in violation of the Fifth Amendment to the Constitution of the United States in that the Regulation alleged to have been violated compels the defendant in a criminal case to be a witness against himself, that is to say, that the defendant is required to fix the maximum price permitted by Section 1364.52 of Maximum Price Regulation No. 169 which forms the basis or standard upon which the indictment and each and every count thereof is predicated in which it is alleged that the defendant sold and delivered wholesale cuts of beef at prices higher than said maximum as determined under said Section 1364.52.

24 4. That the method established by the Price Administrator of fixing the maximum price at which beef and veal carcasses and wholesale cuts thereof could be sold and delivered as provided by Maximum Price Regulation No. 169 is arbitrary in that a person might be compelled to sell or deliver such beef and veal carcasses and wholesale cuts thereof at a price or prices below the actual cost thereof and effecting a confiscation of property without due process of law.

5. That the method established by the Price Administrator of fixing the maximum price at which beef and veal carcasses and

wholesale cuts thereof are permitted to be sold or delivered as provided by Section 1364.52 of Maximum Price Regulation No. 169 is unfair and inequitable.

6. That the findings of fact upon which the punitive regulations are based are not findings of fact to be determined by the Price Administrator, but are required to be made by the defendant against whom a conviction is sought.

7. That the indictment and each and every count thereof alleges that the defendant sold and delivered wholesale cuts of beef at prices higher than the maximum price determined under Section 1364.52 of Maximum Price Regulation No. 169 and in instances where the defendant has no sales of certain grades of beef and veal carcasses and wholesale cuts thereof during the period March 16 to March 28, 1942 he is required to use prices established by competitors; that the standard established or sought to be established by the Office of Price Administration and the Price Administrator is not *certain*, definite and uniform under said Regulation and the defendant is called upon to answer an indictment which differs in standard from other persons engaged in the same business with him and has the effect of requiring him to answer an indictment based upon a standard which to certain sellers of beef and veal carcasses and wholesale cuts thereof may constitute a crime and which to competitors doing the same act constitutes no crime.

25 Wherefore, the defendant prays that this indictment and each and every count thereof be abated and held null and void and the defendant be held not to answer further thereunder.

JACOB HARK
(By his attorney),
(Signed) LEONARD PORETSKY

In United States District Court

Plea in abatement

Filed January 4, 1943

The defendant, Jacob Hark, says that each of the twenty-five counts of the indictment fail to describe him properly and with sufficient particularity and certainty.

Wherefore, the said Jacob Hark prays judgment of the said indictment that the same may be quashed and dismissed, and further that he may be discharged thereof.

(By his attorney),
(Signed) WILLIAM C. MAGUIRE.
William C. Maguire.

In United States District Court

Plea in abatement of the Defendant Hyman Yaffee

Filed January 4, 1943

Now comes the defendant Hyman Yaffee, through his counsel, and pleads in objection to the indictment and each and every count thereof as follows:

1. That he is informed and believes that evidence was obtained in violation of his rights under the Fourth Amendment to the Constitution of the United States in that an agent or agents of the Office of Price Administration acting without a search warrant entered the premises of the defendant and searched his books, records and papers unlawfully and obtained evidence which was later presented to the Grand Jury upon which this indictment was returned.

2. That if the Office of Price Administration or any agent or agents thereof had the lawful right to search, examine, 26 or seize the books, records and papers of the defendant in violation of the Fourth Amendment to the Constitution of the United States, the defendant under the provisions of the Act of Congress known as the Emergency Price Control Act of 1942 (Pub. Law No. 421, 77th Congress) Section 202, paragraph b, was granted immunity from prosecution.

3. That the indictment and each and every count thereof is in violation of the Fifth Amendment to the Constitution of the United States in that the Regulation alleged to have been violated compels the defendant in a criminal case to be a witness against himself, that is to say, that the defendant is required to fix the maximum price permitted by Section 1364.52 of Maximum Price Regulation No. 169 which forms the basis or standard upon which the indictment and each and every count thereof is predicated in which it is alleged that the defendant sold and delivered wholesale cuts of beef at prices higher than said maximum as determined under said Section 1364.52.

4. That the method established by the Price Administrator of fixing the maximum price at which beef and veal carcasses and wholesale cuts thereof could be sold and delivered as provided by Maximum Price Regulation No. 169 is arbitrary in that a person might be compelled to sell or deliver such beef and veal carcasses and wholesale cuts thereof at a price below the actual cost thereof and effecting a confiscation of property without due process of law.

5. That the method established by the Price Administrator of fixing the maximum price at which beef and veal carcasses and

wholesale cuts thereof are permitted to be sold or delivered as provided by Section 1364.52 of Maximum Price Regulation No. 169 is unfair and inequitable.

6. That the findings of fact upon which the punitive regulations are based are not findings of fact to be determined by the Price Administrator, but are required to be made by the defendant against whom a conviction is sought.

27 7. That the indictment and each and every count thereof alleges that the defendant sold and delivered wholesale cuts of beef at prices higher than the maximum price determined under Section 1364.52 of Maximum Price Regulation No. 169 and in instances where the defendant has no sales of certain grades of beef and veal carcasses and wholesale cuts thereof during the period March 16 to March 28, 1942, he is required to use prices established by competitors; that the standard established or sought to be established by the Office of Price Administration and the Price Administrator is not certain, definite, and uniform under said Regulation and the defendant is called upon to answer an indictment which differs in standard from other persons engaged in the same business with him and has the effect of requiring him to answer an indictment based upon a standard which to certain sellers of beef and veal carcasses and wholesale cuts thereof may constitute a crime and which to competitors doing the same acts constitutes no crime.

Wherefore, the defendant prays that this indictment and each and every count thereof be abated and held null and void and the defendant be held not to answer further thereunder.

HYMAN YAFFEE
(By his attorneys),

(Signed) JOHN H. BACKUS.
(Signed) LEONARD PORETSKY.

In United States District Court

Demurrer

Filed January 4, 1943

The defendant, Jacob Hark, demurs to the indictment and to the twenty-five counts thereof, namely one to twenty-five inclusive, upon the following grounds:

1. The allegations of fact necessary to constitute a crime are insufficient, uncertain, and are not set forth with precision and certainty.

2. The allegations in each and every count in the indictment failed to state that the alleged sales were wholesale.

28 3. All of the twenty-five counts in the indictment are duplicitous, in that each count charges the commission of more than one offense.

4. There is no allegation, in any of the twenty-five counts in the indictment, that Regulation 169 was approved as required by law.

5. There is no allegation in any of the twenty-five counts in the indictment that a warning was given as required by law, before any criminal action was taken.

6. The said act, in so far as it creates offenses and imposes penalties, is in violation of the Constitution of the United States and an infringement of the rights of the defendant.

(By his Attorney),
(Signed) WILLIAM C. MAGUIRE.
William C. Maguire.

At the same term on the sixteenth day of January 1943, said cause came on for hearing on the foregoing motions to quash, pleas in abatement, and demurrer, the Honorable George C. Sweeney, District Judge, sitting, and was taken under advisement.

In United States District Court

Opinion

March 5, 1943

SWEENEY, J.: To this indictment the defendants have filed a demurrer, motions to quash, and plea in abatement. In these pleadings they attack the constitutionality of the Emergency Price Control Act of 1942 as being both an improper use of the war power by Congress, and an improper delegation by Congress of its legislative function to an administrative agency. They also insist that the defendants' rights under the Fourth
29 and Fifth Amendments to the Constitution have been invaded and further allege that the Government is without authority to prosecute this indictment, because Maximum Price Regulation No. 169, Sections 1364.51 and 1364.52 were revoked prior to the return of this indictment. It is this last contention that gives the court the most concern.

The constitutionality of this Act, as it relates to the ceiling on rents, has been sustained by a three-judge court in Henderson v. Kimmel, 47 F. Supp, 635, as a legitimate exercise of the war power of Congress which is broad and "well-nigh limitless" (United States v. MacIntosh, 283 U. S. 605, 624). All the rea-

soning of that decision and the many others sustaining the war power of Congress apply with equal force to the price control features of the Act in question. See Rubinstein, Inc. v. Charline's Cut-Rate, Inc., 28 Atl. 2d 113. In the exercise of its very broad power to adopt measures which it deems essential to the war success Congress has intervened in may diverse fields. The Supreme Court has upheld such interferences with property as the taking over and operation of railroads. (Northern Pacific Railway Co. v. North Dakota Ex Rel. Langer, 250 U. S. 135) and the taking over and operation of telephone and telegraph lines (Dakota Central Telephone Co. v. South Dakota Ex Rel. Payne, 250 U. S. 163) and has approved the invasion of the freedom of the individual by compulsory military service both at home and abroad. (Arver, et al., v. United States, 245 U. S. 366.) The power to enact the Emergency Price Control Act of 1942 cannot be seriously questioned in the light of these decisions. Indeed, it would be a strange situation to grant that Congress has the power to take men from their homes and to send them to war, and to deny that Congress has the right to prevent profiteering by those supplying food to their dependents.

Nor is the exercise of this broad power weakened constitutionally by the delegation of its power under proper standards to those charged with the administration of the Act. Congress has set forth the objectives in Section 1 (a), (50 App. U. S. C. A. § 901 (a). To attain these objectives maximum price regulations were authorized to be promulgated, the procedure for which is set out in Section 2 (a), (50 App. U. S. C. A. § 902 (a)). There is no loose and general delegation of authority here as in Panama Refining Co. v. Ryan, 293 U. S. 388, and Schechter Corp. v. United States, 295 U. S. 495. The delegation here is specific and limited by the very terms of the Act.

Congress in the exercise of its legislative function has determined the legislative policy and its formulation as a rule of conduct, by specifying the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective. Opp Cotton Mills v. Administrator, 312 U. S. 126, 145 (dealing with the Fair Labor Standards Act); see, also, Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 (dealing with the Bituminous Coal Act of 1937), and United States v. Rock Royal Co-op., 307 U. S. 533 (dealing with the Agricultural Marketing Agreement Act of 1937). I therefore conclude that the delegation was not improper, and it follows that the Act

is not unconstitutional, either by reason of a want of power in Congress to enact the statute, or by reason of an improper delegation of authority to the administrative officer charged with enforcement of the Act.

The question whether the prosecution of this indictment can be maintained is a very bothersome one. Maximum Price Regulation No. 169 was promulgated effective July 20, 1942. On December 10, 1942, Revised Maximum Price Regulation No. 169 was issued to be effective December 16, 1942. While this purported to be an amendment to the original regulation, it provided that "Sections 1364.51 through 1364.67 are revoked." All counts of the indictment are based on Section 1364.52. The indictment was returned to the District Court on December 21, 1942.

The common law rule was that on the repeal of an act without any reservation of its penalties, all criminal proceedings taken under it fell. United States v. Reisinger, 128 U. S. 398. See, also, United States v. Borke, 5 F. Supp. 429; United States v. Gibson, 5 F. Supp. 153; United States v. Chambers,
31 291 U. S. 217; Hutchens v. United States, 68 F. 2d 1006; Cornerz v. United States, 69 F. 2d 1002; Cossiboin v. United States, 69 F. 2d 1002; Goldberg v. United States, 69 F. 2d 1005; Martino v. United States, 69 F. 2d 1010; Miller v. United States, 69 F. 2d 1011; Landen v. United States, 299 F. 75; Vincenti v. United States, 272 F. 114. The basis of this rule was a presumption that the repeal was intended as a legislative pardon for past acts. 22 C. J. S. § 27, b, (4). To avoid the application of this rule, Congress passed 1 U. S. C. A. § 29, which reads as follows:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forefeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

The effect of this statute is to prescribe a rule of construction different from the common law rule that is binding upon the courts in all cases covered by it, but it refers only to "repeal of any statute," and does not refer to regulations or orders thereunder. Since this prescription is in derogation of the common law rights of persons accused of crime it is to be strictly construed and is limited to the repeal of statutes. The Emergency Price Control Act of 1942 is not self-operative, and the type of crime which is charged in this indictment could not come into existence until regulations had been promulgated by the admin-

istrator under legislative authority delegated to him by Congress. In other words, so far as the price control features of the Act are concerned, the statute needed implementing regulations before a crime could be committed. The findings of fact incidental to, and the promulgation of, implementing regulations are steps in the legislative function. See Opp Cotton Mills v. Administrator, supra. Congress has not seen fit to include regulations in the wording of its general savings clause (1 U. S. C. A. § 29), and neither has the Congress or the administrator effected any other saving clause that would be applicable to Maximum Price Regulation No. 169. It would seem that Congress has empowered the administrator to insert a saving clause in any amended regulation for in Section 2 (g) (50 App. U. S. C. A. 32 § 902 (g)), it is provided that:

"Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

And if not contained in this section I think that the authority might be implied generally, but if there is no power in the administrator to add a saving clause in his regulations, then the power rests complete in Congress.

In Section 1 (b) of the Emergency Price Control Act of 1942 (50 App. U. S. C. A. § 901 (b)) Congress has particularly provided a saving clause that will permit prosecutions after the Act has been terminated either "on June 30, 1944, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier," but, again, this saving clause applies to the termination or repeal of the Act in any of the three manners specified. It has no application to the revocation of sections of a regulation.

Inasmuch as this is a criminal matter in which all doubts should be resolved in favor of the accused, and, since I doubt very much that a prosecution can be maintained under this indictment, I think that the question of the Government's right to proceed should be finally determined before entering into a possibly long and expensive trial on the merits. The United States has a right of appeal under 18 U. S. C. A. § 682. I therefore rule that these defendants cannot be held to answer to this indictment, because of the revocation of Section 1364.52 of Maximum Price Regulation No. 169, upon which the counts of the indict-

ment are based, prior to the return of the indictment by the grand jury.

The motion to quash is granted.

In United States District Court

Order quashing indictment

March 31, 1943

SWEENEY, J.: This cause came on to be heard upon the defendant's motion to quash the indictment alleging that Maximum Price Regulation No. 169 has been revoked by the Price Administrator, effective December 16, 1942, before the indictment was returned. This allegation was not denied by the Government. After hearing arguments of counsel for the defendant and of the United States Attorney, it is

Ordered that the indictment be and it hereby is quashed on the ground that the Regulation alleged to have been violated was revoked prior to the return of the indictment.

By the Court:

ARTHUR M. BROWN,
Deputy Clerk.

March 31, 1943.
GEORGE C. SWEENEY,
U. S. D. J.

33 In United States District Court

Petition for appeal

The United States of America, plaintiff in the above-entitled case, considering itself aggrieved by the order of this Court entered on the 31st day of March 1943, quashing the indictment in this cause does hereby pray an appeal from said order to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said order was

based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

(Signed) EDMUND J. BRANDON,
Edmund J. Brandon,
United States Attorney.

(Signed) ROBERT L. WRIGHT.
Robert L. Wright,
Special Assistant to the Attorney General.

Allowed:
GEORGE C. SWEENEY,
This 30th day of April 1943.

34 In United States District Court

Order allowing appeal

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the order of this Court entered on the 31st day of March 1943, quashing the indictment in this cause, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided.

It is therefore ordered and adjudged

That the appeal be and the same is hereby allowed as prayed for.

(Signed) GEORGE C. SWEENEY.
George C. Sweeney,
District Judge.

This 30th day of April 1943.

In United States District Court

Assignment of errors and prayer for reversal

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for an appeal to the Supreme Court of the United States hereby assigns error to the record and proceedings and to the entry of the order quashing the indictment by the said District Court on March 31, 1943, in the above-entitled cause, and says that in the entry of the said order the said District Court committed material error to the prejudice of the said plaintiff in the following particulars:

1. The court erred in sustaining the defendants' motions to quash the indictment.

2. The court erred in entering an order quashing the indictment on the ground that the regulation alleged to have been violated was revoked prior to the return of the indictment.

3. The court erred in holding that criminal liability for
35 violation of a regulation issued pursuant to the Emergency Price Control Act of 1942 (50 U. S. C. App. 901) was extinguished or released by revocation of the regulation prior to the return of the indictment.

4. The court erred in holding that Section 13 of the Revised Statutes (1 U. S. C. 29) did not prevent the extinguishing or the releasing of criminal liability for violation of a regulation revoked prior to the return of the indictment.

Wherefore the United States of America respectively prays that the order of the District Court quashing the indictment may be reversed, and for such other and fit relief as to the Court may seem just and proper.

(Signed) EDMUND J. BRANDON,
Edmund J. Brandon,
United States Attorney.

(Signed) ROBERT L. WRIGHT,
Special Assistant to the Attorney General.

This 30th day of April 1943.

41 In United States District Court

Citation

To: Jacob Hark and Hyman Yaffee, co-partners doing business as Liberty Beef Company.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in Washington within forty (40) days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts, wherein the United States of America is appellant and you are appellees, to show cause why the judgment rendered against the said appellant as mentioned in said appeal should not be corrected.

(Signed) GEORGE C. SWEENEY,
George C. Sweeney,
District Judge.

This 30th day of April 1943.

In United States District Court

Praecipe for transcript of record

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript in the order given below the following papers, viz.:

1. Docket and minute entries showing return of the indictment, filing of motions to quash the indictment, pleas in abatement and the demurrer to the indictment, and entry of the order and judgment sustaining motions to quash the indictment.
2. The indictment.
3. Motions to quash the indictment filed by each appellee.
4. Pleas in abatement filed by each appellee.
5. Demurrer filed by Jacob Hark.
6. Opinion of Judge Sweeney dated March 5, 1943.
7. Order and judgment quashing indictment.

42 8. Petition for appeal.

9. Order allowing appeal.
10. Assignment of errors.
11. Statement required by Rule 12, paragraph 2.
12. Citation.
13. Proof of service.
14. Statement as to jurisdiction.
15. This praecipe.

(Signed) EDMUND J. BRANDON,
Edmund J. Brandon,
United States Attorney.

(Signed) ROBERT L. WRIGHT,
Special Assistant to the Attorney General.

This 30th day of April 1943.

45 In United States District Court

Docket entries

1942

Dec. 21—Indictment returned.

Dec. 22—Healey, J. Defts. (2) arraigned and severally pleaded not guilty.

Dec. 22—Healey, J. Defts. (2) ordered to recognize with sufficient security, each in the sum of $2500. Recogs. on file-quals. surety.

Dec. 22—Healey, J. Defts. (2) each given ten days to withdraw plea and file special pleas, unless case is reached for trial before that time.

1942

Dec. 31—Motion to extend time for filing pleadings and answer to indictment filed by deft. Hark.

Dec. 31—Motion to extend time for filing pleadings and answer to indictment filed by deft. Yaffee.

Dec. 31—Sweeney, J. Motions to extend time for filing pleadings and answer to indictment allowed: time extended to Jan. 4, 1943 at 4:00 P. M.

1943

Jan. 4—Pleas in abatement (2) filed by deft. Hark.

Jan. 4—Plea in abatement filed by deft. Yaffee.

Jan. 4—Motions to quash (2) filed by deft. Hark.

Jan. 4—Motion to quash filed by deft. Yaffee.

Jan. 4—Demurrer filed by deft. Hark.

Jan. 16—Sweeney, J. Hearing on pleas in abatement filed by deft. Hark, plea in abatement filed by deft. Yaffee, motions to quash filed by deft. Hark, motion to quash filed by deft. Yaffee, and demurrer filed by deft. Hark; taken under advisement; one week for briefs.

Mar. 5—Sweeney, J. Opinion—Motion to quash is granted.

Mar. 31—Sweeney, J. Order quashing indictment.

Apr. 30—Petition for appeal filed by United States.

Apr. 30—Statement as to jurisdiction filed by United States.

Apr. 30—Assignment of errors and prayer for reversal filed by United States.

Apr. 30—Sweeney, J. Order allowing appeal.

Apr. 30—Citation issued—returnable within forty days from this date.

Apr. 30—Praecipe filed by United States.

May 15—Statement and motion opposing jurisdiction of appeal filed by defendants.

46 [Clerk's certificate to foregoing transcript omitted in printing.]

47 In the Supreme Court of the United States

Statement of points to be relied upon and designation of parts of the record necessary for consideration thereof

Filed June 11, 1943

1. Now comes the appellant in the above-entitled cause and for its statement of the points upon which it intends to rely in

its appeal to this Court adopts the points contained in its assignment of errors heretofore filed herein.

2. The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

CHARLES FAHY,
Charles Fahy,
Solicitor General.

Dated this 4th day of June 1943.

48 Service of the foregoing statement of points to be relied upon and designation of parts of the record necessary for consideration thereof and receipt of a copy thereof are hereby acknowledged this 8th day of June 1943.

WILLIAM C. MAGUIRE,
William C. Maguire,

WILLIAM H. LEWIS,
William H. Lewis,
Attorneys for Jacob Hark.

JOHN H. BACKUS and LEONARD PORETSKY,
John H. Backus and Leonard Poretsky,
Attorneys for Hyman Yaffee.

[File endorsement omitted.]

49 Supreme Court of the United States

Order postponing further consideration of question of jurisdiction

(June 21, 1943)

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

[Endorsement on cover:] File No. 47,569. Massachusetts, D. C. U. S. Term No. 83. The United States of America, Appellant, vs. Jacob Hark and Hyman Yaffee, Co-partners doing business as Liberty Beef Company. Filed June 4, 1943. Term No. 83 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE 1943

No. 1068

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES OF AMERICA, APPELLANT

vs.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT AS TO JURISDICTION

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1068

THE UNITED STATES OF AMERICA, APPELLANT

vs.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court entered in this cause on March 31, 1943. The petition for appeal was filed on April 30, 1943, and is presented to the District Court herewith on the 30th day of April 1943.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this

533263—43

cause is conferred by the Act of March 2, 1907, as amended by the Act of May 9, 1942 (34 Stat. 1246; 56 Stat. 401; 18 U. S. C. 682), commonly known as the Criminal Appeals Act, and by 28 U. S. C. 345.

STATUTES INVOLVED

A printed copy of the Emergency Price Control Act of 1942, 56 Stat. 23; 50 U. S. C. App. 901, is attached hereto.

Section 13 of the Revised Statutes (1 U. S. C. 29) provides as follows:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

THE ISSUES AND THE RULING BELOW

The indictment in this case was returned on December 21, 1942. In twenty-four counts it charges Jacob Hark and Hyman Yaffee, copartners doing business as Liberty Beef Company, with selling wholesale cuts of beef at prices higher than those determined under Maximum Price Regulation No. 169, as amended, issued pursuant to the Emergency Price Control Act of 1942.

The indictment alleges that on June 19, 1942, the Price Administrator issued Maximum Price Regu-

lation No. 169 which became effective on July 20, 1942.[1] Section 1364.51 of the Regulations provided that no person should sell or deliver any beef or veal carcass or wholesale cut at a price higher than the maximum price permitted by Section 1364.52 of the Regulation. At all times referred to in the indictment this Regulation, as amended, was in effect under the provisions of Section 2 of the Emergency Price Control Act of 1942, and the maximum prices for the sale of beef and veal carcasses and wholesale cuts were determined under Section 1364.52 of the Regulation, as amended.

Each count of the indictment alleges that on a particular date the defendants made a specified sale of wholesale cuts of beef at prices higher than those determined under Section 1364.52 of the Regulation, as amended. All of the dates on which the sales are alleged to have been made fall between September 29, 1942, and November 13, 1942.

Each of the defendants filed a pleading entitled "motion to quash" alleging as grounds, among others, that the Emergency Price Control Act of

---

[1] 7 Fed. Reg. 4653.

[2] The motions to quash raised a number of other questions which were not discussed or ruled upon by the court below and are unnecessary to the discussion here. In addition, the defendant Hark filed four other pleadings, two entitled "Plea in Abatement," one "Demurrer," and one "Motion to Quash"; and the defendant Yaffee filed one other pleading entitled "Plea in Abatement." The additional questions raised in these various pleadings were likewise not discussed or ruled upon by the District Court and are not pertinent here.

1942 is unconstitutional, and that "the indictment sets forth no crime against the United States as of the date of the indictment" for the reason that Sections 1364.51 and 1364.52 of the Regulation, as amended, had been revoked by an order of the Price Administrator which became effective December 16, 1942, prior to the return of the indictment.[3]

The District Court, although it concluded that the Act was within the war power of Congress and did not improperly delegate legislative authority to the Price Administrator, held that the "defendants cannot be held to answer to this indictment" because of the revocation of the pertinent provisions of the Regulation prior to the return of the indictment, although after the date of the violations. In reaching this decision the Court held: (1) the general rule that repeal of a statute without reservation of the right to prosecute for past violations operates to prevent further proceedings in pending prosecutions applies to revoked administrative regulations; (2) the general saving provision of Section 13 of the Revised Statutes (1 U. S. C. 29) does not apply for the reason that it is limited to the repeal of statutes and has no application in the case of revoca-

[3] The facts are that on December 10, 1942, the Price Administrator issued a Revised Maximum Price Regulation No. 169 to become effective December 16, 1942. This revision states that Sections 1364.51 through 1364.67 "are revoked" and establishes new maximum prices. 7 Fed. Reg. 10381.

tion of administrative regulations. Accordingly, the District Court ordered that the indictment be "quashed on the ground that the regulation alleged to have been violated was revoked prior to the return of the indictment."

THE SUPREME COURT HAS JURISDICTION UNDER THE CRIMINAL APPEALS ACT

We think it is clear that the Supreme Court has jurisdiction to review the decision of the District Court under the provision of the Criminal Appeals Act (18 U. S. C. 682) giving the United States the right to appeal directly to the Supreme Court in criminal cases from a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

Whether the decision of the District Court was one sustaining a plea in bar within the meaning of this provision is to be determined not by form but by substance. *United States* v. *Thompson*, 251 U. S. 407, 412; *United States* v. *Goldman*, 277 U. S. 229, 236 (Statute of Limitations). It is immaterial that the motion was entitled "motion to quash" or that the ruling of the court was that the indictment be "quashed" if the judgment in substance sustained a plea in bar. *United States* v. *Goldman*, supra; *United States* v. *Thompson*, supra; *United States* v. *Oppenheimer*, 242 U. S. 85, 86; *United States* v. *Barber*, 219 U. S. 72, 78.

Here the judgment was not based on the insufficiency of the indictment nor on irregularities

in the grand jury proceedings. Rather it sustained a defense, in the form of confession and avoidance, directed to the merits of the charges in the indictment. In substance, therefore, it was a judgment sustaining a special plea in bar.

In *United States* v. *Chambers*, 291 U. S. 217, the Supreme Court entertained an appeal taken by the Government under the Criminal Appeals Act in substantially similar circumstances. There the District Court had dismissed the indictment on the ground that the repeal of the Eighteenth Amendment prevented further proceedings under an indictment charging a conspiracy to violate the National Prohibition Act, the defense having been raised by a plea in abatement and a demurrer.

THE QUESTIONS ARE SUBSTANTIAL

We think the District Court erred in holding that the general rule regarding the effect of repeal of a statute on pending prosecutions applies in the case of revoked administrative regulations. The rationale of that rule is that continued prosecution depends upon the continued life of the statute which the prosecution seeks to apply. *United States* v. *Chambers*, *supra*, p. 223; *United States* v. *Tynen*, 11 Wall. 88, 95. Different considerations apply, however, in the case of revoked administrative regulations. In such a case, although the administrative regulation fills in the details, it is the statute, not the regulation, which

establishes the crime and fixes the penalty. Revocation or change of the regulation does not and could not affect the statutory provisions.

The question has been authoritatively decided, we believe, by the Supreme Court in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, sustaining a prosecution for violation of a Presidential embargo, where the Proclamation declaring the embargo had been revoked at the time of the indictment but the Joint Resolution authorizing it and fixing criminal penalties had not been repealed.

A similar result had previously been reached by at least one Circuit Court of Appeals, on the ground that the general saving provision in Section 13 of the Revised Statutes should be construed to save such prosecutions. *Landen* v. *United States*, 299 Fed. 75, 78 (C. C. A. 6); cf. *DeFour* v. *United States*, 260 Fed. 596 (C. C. A. 9), certiorari denied, 253 U. S. 487; *Goublin* v. *United States*, 261 Fed. 5 (C. C. A. 9).

The questions presented by this case are of large importance in the administration of both the Emergency Price Control Act of 1942 and Title III of the Second War Powers Act (50 U. S. C. App. 633), as well as numerous other important federal statutes which contemplate changes from time to time in administrative regulations to meet changing conditions.

—For the foregoing reasons it is respectfully submitted that this case presents issues of substance which call for review by the Supreme Court.

(Signed) CHARLES FAHY,
Solicitor General.

APRIL 1943.

[PUBLIC LAW 421—77TH CONGRESS]

[CHAPTER 26—2D SESSION]

[H. R. 5990]

AN ACT

To further the national defense and security by checking speculative and excessive price rises, price dislocations, and inflationary tendencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GENERAL PROVISIONS AND AUTHORITY

PURPOSES; TIME LIMIT; APPLICABILITY

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1943, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations,

orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability, or offense.

(c) The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia.

PRICES, RENTS, AND MARKET AND RENTING PRACTICES

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to

the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d; except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. In any case in which a commodity is domestically produced, the powers granted to the Administrator by this subsection shall be exercised with respect to importations of such commodity only to the extent that, in the judgment of the Administrator, the domestic production of the commodity is not sufficient to satisfy the demand therefor. Nothing in this section shall be construed to modify, suspend, amend, or supersede any provision of the Tariff Act of 1930, as amended, and nothing in this section, or in any existing law, shall be construed to authorize any sale or other disposition of any agricultural commodity contrary to the provisions of the Agricultural Adjustment Act of 1938, as amended, or to authorize the Administrator to prohibit trading in any agricultural commodity for future delivery if such trading is subject to the provisions of the Commodity Exchange Act, as amended.

(f) No power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of section 3, and no agricultural commodity shall be sold within the United States pursuant to the provisions of this section by any governmental agency at a price below the price limitations imposed by section 3 (a) of this Act with respect to such commodity.

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

(i) No maximum price shall be established for any fishery commodity below the average price of such commodity in the year 1941.

AGRICULTURAL COMMODITIES

SEC. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section.

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or occupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder.

(c) It shall be unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, to disclose, otherwise than in the course of official duty, any information obtained under this Act, or to use any such information, for personal benefit.

(d) Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.

VOLUNTARY AGREEMENTS

SEC. 5. In carrying out the provisions of this Act, the Administrator is authorized to confer with producers, processors, manufacturers, retailers, wholesalers, and other groups having to do with commodities, and with representatives and associations thereof, to cooperate with any agency or person, and to enter into voluntary arrangements or agreements with any such persons, groups, or associations relating to the fixing of maximum prices, the issuance of other regulations or orders, or the other purposes of this Act, but no such arrangement or agreement shall modify any regulation, order, or price schedule previously issued which is effective in accordance with the provisions of section 2 or section 206. The Attorney General shall be promptly furnished with a copy of each such arrangement or agreement.

TITLE II—ADMINISTRATION AND ENFORCEMENT

ADMINISTRATION

SEC. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

(c) The Administrator shall have authority to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere; for lawbooks and books of reference; and for paper, printing, and binding) as he may deem necessary for the administration and enforcement of this Act. The provisions of section 3709 of the Revised Statutes shall not apply to the purchase of supplies and services by the Administrator where the aggregate amount involved does not exceed $250.

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

INVESTIGATIONS; RECORDS; REPORTS

SEC. 202. (a) The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confi-

dential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

PROCEDURE

SEC. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

REVIEW

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have

exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and

fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended. (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c), and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with

State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

(f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with

the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202: *Provided*, That no such license may be required as a condition of selling or distributing (except as waste or scrap) newspapers, periodicals, books, or other printed or written material, or motion pictures, or as a condition of selling radio time: *Provided further*, That no license may be required of any farmer as a condition of selling any agricultural commodity produced by him, and no license may be required of any fisherman as a condition of selling any fishery commodity caught or taken by him: *Provided further*, That in any case in which such a license is required of any person, the Administrator shall not have power to deny to such person a license to sell any commodity or commodities, unless such person already has such a license to sell such commodity or commodities, or unless there is in effect under paragraph (2) of this subsection with respect to such person an order of suspension of a previous license to the extent that such previous license authorized such person to sell such commodity or commodities.

(2) Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations hereinafter provided, for an order suspending the license of such person for any period of not more than twelve months. If any such court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months. For the purposes of this subsection, any such proceedings for the suspension of a license may be brought in a district court if the licensee is doing business in more than one State, or if his gross sales exceed $100,000 per annum. Within thirty days after the entry of the judgment or order of any

court either suspending a license, or dismissing or denying in whole or in part the Administrator's petition for suspension, an appeal may be taken from such judgment or order in like manner as an appeal may be taken in other cases from a judgment or order of a State, Territorial, or district court, as the case may be. Upon good cause shown, any such order of suspension may be stayed by the appropriate court or any judge thereof in accordance with the applicable practice; and upon written stipulation of the parties to the proceeding for suspension, approved by the trial court, any such order of suspension may be modified, and the license which has been suspended may be restored, upon such terms and conditions as such court shall find reasonable. Any such order of suspension shall be affirmed by the appropriate appellate court if, under the applicable rules of law, the evidence in the record supports a finding that there has been a violation of any provision of such license, regulation, order, price schedule, or requirement after receipt of such warning notice. No proceedings for suspension of a license, and no such suspension, shall confer any immunity from any other provision of this Act.

SAVING PROVISIONS

SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. Such price schedules shall be consistent with the standards contained in section 2 and the limitations contained in section 3 of this Act, and shall be subject to protest and review as provided in section 203 and section 204 of this Act. All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

TITLE III—MISCELLANEOUS

QUARTERLY REPORT

SEC. 301. The Administrator from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act. If the Senate or the House of Representatives is not in session, such reports shall be transmitted to the Secretary of the Senate, or the Clerk of the House of Representatives, as the case may be.

DEFINITIONS

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(e) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio broadcasting station, a motion picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional service.

(d) The term "defense-rental area" means the District of Columbia, and any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act.

(e) The term "defense-area housing accommodations" means housing accommodations within any defense-rental area.

(f) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, (including houses, apartments, hotels, rooming or boarding house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(g) The term "rent" means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations.

(h) The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency.

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations. Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

(j) The term "documents" includes records, books, accounts, correspondence, memoranda, and other documents, and drafts and copies of any of the foregoing.

(k) The term "district court" means any district court of the United States, and the United States Court for any Territory or other place subject to the jurisdiction of the United States; and the term "circuit courts of appeals" includes the United States Court of Appeals for the District of Columbia.

SEPARABILITY

SEC. 303. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

APPROPRIATIONS AUTHORIZED

SEC. 304. There are authorized to be appropriated such sums as may be necessary or proper to carry out the provisions and purposes of this Act.

APPLICATION OF EXISTING LAW

SEC. 305. No provision of law in force on the date of enactment of this Act shall be construed to authorize any action inconsistent with the provisions and purposes of this Act.

SHORT TITLE

SEC. 306. This Act may be cited as the "Emergency Price Control Act of 1942".

Approved, January 30, 1942.

District Court of the United States
District of Massachusetts

CRIMINAL NO. 16021

THE UNITED STATES

v.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS, DOING BUSINESS AS LIBERTY BEEF COMPANY

OPINION

[March 5, 1943]

SWEENEY, J. To this indictment the defendants have filed a demurrer, motions to quash, and pleas in abatement. In these pleadings they attack the constitutionality of the Emergency Price Control Act of 1942 as being both an improper use of the war power by Congress, and an improper delegation by Congress of its legislative function to an administrative agency. They also insist that the defendants' rights under the Fourth and Fifth Amendments to the Constitution have been invaded, and further allege that the Government is without authority to prosecute this indictment, because Maximum Price Regulation No. 169, Sections 1364.51 and 1364.52 were revoked prior to the return of this indictment. It is this last contention that gives the court the most concern.

The constitutionality of this Act, as it relates to the ceiling on rents, has been sustained by a three-judge court in *Henderson* v. *Kimmel*, 47 F. Supp. 635, as a legitimate exercise of the war power of Congress which is broad and "well-nigh limitless" (*United States* v. *MacIntosh*, 283 U. S. 605, 624). All the reasoning of that decision and the many others sustaining the war power of Congress apply with equal force to the price control features of the Act in question. See *Rubinstein, Inc.* v. *Charline's Cut Rate, Inc.*, 28 Atl. 2d 113. In the exercise of its very broad power to adopt measures which it deems essential to the war success Congress has intervened in many diverse fields. The Supreme Court has upheld such interferences with property as the taking over and operation of railroads (*Northern Pacific Railway Co.* v. *North Dakota Ex Rel. Langer*, 250 U. S. 135) and the taking over and operation of telephone and telegraph lines (*Dakota Central Telephone Co.* v. *South Dakota Ex Rel. Payne*, 250 U. S. 163) and has approved the invasion of the freedom of the individual by compulsory military service both at home and abroad, (*Arver et al.* v. *United States*, 245 U. S. 366). The power to enact the Emergency Price Control Act of 1942 cannot be seriously questioned in the light of these decisions. Indeed, it would be a strange situation to grant that Congress has the power to take men from their homes and to send them to war, and

to deny that Congress has the right to prevent profiteering by those supplying food to their dependents.

Nor is the exercise of this broad power weakened constitutionally by the delegation of its power under proper standards to those charged with the administration of the Act. Congress has set forth the objectives in Section 1 (a), (50 App. U. S. C. A. § 901 (a). To attain these objectives maximum price regulations were authorized to be promulgated, the procedure for which is set out in Section 2 (a), (50 App. U. S. C. A. § 902 (a). There is no loose and general delegation of authority here as in *Panama Refining Co. v. Ryan*, 293 U. S. 388, and *Schechter Corp. v. United States*, 293 U. S. 495. The delegation here is specific and limited by the very terms of the Act.

Congress in the exercise of its legislative function has determined the legislative policy and its formulation as a rule of conduct, by specifying the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective. *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 145 (dealing with the Fair Labor Standards Act); see, also, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (dealing with the Bituminous Coal Act of 1937), and *United States v. Rock Royal Co-op.*, 307 U. S. 533 (dealing with the Agricultural

Marketing Agreement Act of 1937). I therefore conclude that the delegation was not improper, and it follows that the Act is not unconstitutional, either by reason of a want of power in Congress to enact the statute, or by reason of an improper delegation of authority to the administrative officer charged with enforcement of the Act.

The question whether the prosecution of this indictment can be maintained is a very bothersome one. Maximum Price Regulation No. 169 was promulgated effective July 20, 1942. On December 10, 1942, Revised Maximum Price Regulation No. 169 was issued to be effective December 16, 1942. While this purported to be an amendment to the original regulation, it provided that "Sections 1364.51 through 1364.67 are revoked." All counts of the indictment are based on Section 1364.52. The indictment was returned to the District Court on December 21, 1942.

The common law rule was that on the repeal of an act without any reservation of its penalties, all criminal proceedings taken under it fell. *United States* v. *Reisinger*, 128 U. S. 398. See, also, *United States* v. *Borke*, 5 F. Supp. 429; *United States* v. *Gibson*, 5 F. Supp. 153; *United States* v. *Chambers*, 291 U. S. 217; *Hutchens* v. *United States*, 68 F. 2d 1006; *Cornerz* v. *United States*, 69 F. 2d 1002; *Cossiboom* v. *United States*, 69 F. 2d 1002; *Goldberg* v. *United States*, 69 F. 2d 1005; *Martino* v. *United States*, 69 F. 2d 1010; *Miller* v.

United States, 69 F. 2d 1011; *Landon v. United States*, 299 F. 75; *Vincenti v. United States*, 272 F. 114. The basis of this rule was a presumption that the repeal was intended as a legislative pardon for past acts. *22 C. J. S. § 27 b, (4)*. To avoid the application of this rule Congress passed 1 U. S. C. A. § 29, which reads as follows:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

The effect of this statute is to prescribe a rule of construction different from the common law rule that is binding upon the courts in all cases covered by it, but it refers only to "repeal of any statute," and does not refer to regulations or orders thereunder. Since this prescription is in derogation of the common law rights of persons accused of crime it is to be strictly construed and is limited to the repeal of statutes. The Emergency Price Control Act of 1942 is not self-operative, and the type of crime which is charged in this indictment could not come into existence until regulations had been promulgated by the administrator under legislative authority delegated to him by Congress. In other words, so

far as the price control features of the Act are concerned, the statute needed implementing regulations before a crime could be committed. The findings of fact incidental to, and the promulgation of, implementing regulations are steps in the legislative function. See *Opp Cotton Mills* v. *Administrator*, supra. Congress has not seen fit to include regulations in the wording of its general saving clause (1 U. S. C. A. § 29), and neither has the Congress or the administrator effected any other saving clause that would be applicable to Maximum Price Regulation No. 169. It would seem that Congress has empowered the administrator to insert a saving clause in any amended regulation for in Section 2 (g) (50 App. U. S. C. A. § 902 (g)) it is provided that:

> Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

And if not contained in this section I think that the authority might be implied generally, but if there is no power in the administrator to add a saving clause in his regulations, then the power rests complete in Congress.

In Section 1 (b) of the Emergency Price Control Act of 1942 (50 App. U. S. C. A. § 901 (b)) Congress has particularly provided a saving clause that will permit prosecutions after the Act has

been terminated either "on June 30, 1944, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier," but, again, this saving clause applies to the termination or repeal of the Act in any of the three manners specified. It has no application to the revocation of sections of a regulation.

Inasmuch as this is a criminal matter in which all doubts should be resolved in favor of the accused, and, since I doubt very much that a prosecution can be maintained under this indictment, I think that the question of the Government's right to proceed should be finally determined before entering into a possibly long and expensive trial on the merits. The United States has a right of appeal under 18 U. S. C. A. § 682. I therefore rule that these defendants cannot be held to answer to this indictment, because of the revocation of Section 1364.52 of Maximum Price Regulation No. 169, upon which the counts of the indictment are based, prior to the return of the indictment by the grand jury.

The motion to quash is granted.

U. S. GOVERNMENT PRINTING OFFICE: 1943

No. 83

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, APPELLANT

v.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

535132—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 83

THE UNITED STATES OF AMERICA, APPELLANT

v.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 25) is reported in 49 F. Supp. 95.

JURISDICTION

The order of the district court dismissing the indictment was entered on March 31, 1943 (R. 29). Petition for appeal was filed on April 30, 1943, and was allowed the same day (R. 29, 30). The jurisdiction of this Court is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the

Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. II, sec. 682, commonly known as the Criminal Appeals Act, and Section 238 of the Judicial Code as amended, 28 U. S. C., sec. 345. This Court on June 21, 1943, postponed further consideration of the question of jurisdiction to the hearing of the cause on the merits (R. 34).

QUESTIONS PRESENTED

Two preliminary questions as to the jurisdiction of this Court under the Criminal Appeals Act are presented. They are:

(1) Whether the appeal, taken within 30 days after the district court entered an order quashing the indictment but more than 30 days after it rendered its opinion, was taken within 30 days after its "decision or judgment" had been rendered.

(2) Whether the judgment and decision of the district court was either in substance one "sustaining a special plea in bar" or one based upon the construction of the statute upon which the indictment was founded.

On the merits, the question presented by the appeal is:

(3) Whether, under the provisions of the Emergency Price Control Act of 1942 making wilful violations of maximum price-regulations issued by the Price Administrator a criminal offense, revocation of such a regulation terminates the power to prosecute for violations of the revoked regulation committed while it was in effect.

STATUTES INVOLVED

Section 13 of the Revised Statutes, 1 U. S. C. sec. 29, and the pertinent provisions of the Criminal Appeals Act and of the Emergency Price Control Act of 1942 are set forth in the Appendix, *infra*, pp. 35–46.

STATEMENT

The indictment in this case was returned on December 21, 1942. It charges Jacob Hark and Hyman Yaffee, copartners doing business as Liberty Beef Company, with selling wholesale cuts of beef at prices higher than those determined by Maximum Price Regulation No. 169, as amended, issued pursuant to the Emergency Price Control Act of 1942.[1]

The indictment alleges that on June 19, 1942, the Price Administrator issued Maximum Price Regulation No. 169;[2] that it became effective as to wholesalers on July 20, 1942; that at all times referred to in the indictment said Regulation, as amended, was in effect; and that Section 1364.51 thereof provided that no person should sell any

[1] Section 2 (a) of the Act (*infra*, p. 37) provides that the Price Administrator may "by regulation or order" establish such maximum prices for a commodity as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. Section 4 (a), *infra*, p. 39, makes it unlawful to sell any commodity "in violation of any regulation or order" under Section 2. Section 205 (b), *infra*, p. 41, makes it a criminal offense wilfully to violate any provision of Section 4.

[2] See 7 Fed. Reg. 4653.

wholesale cut of beef at a price higher than the maximum price permitted by Section 1364.52 thereof.[3]

The indictment contains 24 counts (R. 1–12). Each count alleges that on a particular date appellees made a specified sale of wholesale cuts of beef at prices higher than those determined by Maximum Price Regulation No. 169 as amended. All of the dates on which such sales are alleged to have been made fall between September 29, 1942, and November 13, 1942.

Each of the appellees filed a motion to quash the indictment (R. 12, 17)[4] which, in addition to alleging that the Emergency Price Control Act of 1942 was unconstitutional, alleged that "the indictment sets forth no crime against the United States as of the date of the indictment" for the reason that Sections 1364.51 and 1364.52 of the Regulation had been revoked by an order of the Price Administrator which became effective De-

[3] These allegations, found in paragraphs 2–4 of count one (R. 1), were reaffirmed and incorporated in each subsequent count of the indictment.

[4] The motions raised a number of other questions which were not discussed or ruled upon by the court below and are unnecessary to the discussion here. Appellee Hark also filed a second motion to quash (R. 16) two pleas in abatement (R. 21, 22) and a demurrer (R. 24) and appellee Yaffee filed a plea in abatement (R. 23). These pleadings raised additional questions which were not discussed or ruled upon by the district court and are not pertinent here.

cember 16, 1942, prior to the return of the indictment (R. 16, 20).[5]

On March 5, 1943, the district court rendered an opinion holding that the Emergency Price Control Act of 1942 was within the war power of Congress and did not improperly delegate legislative authority to the Price Administrator, but that appellees "cannot be held to answer to this indictment" because the pertinent provisions of the Regulation which they were charged with violating had been revoked prior to the return of the indictment. The grounds which the court gave for the latter conclusion were (1) that the general rule that the repeal of a statute without reservation of the right to prosecute for past violations operates to prevent further proceedings in pending prosecutions applies to revoked administrative regulations and (2) that the general saving provision of Section 13 of the Revised Statutes is limited to the repeal of statutes and does not

[5] On December 10, 1942, the Price Administrator issued a Revised Maximum Price Regulation No. 169, to become effective December 16, 1942, which stated that sections 1364.51 through 1364.67 "are revoked" and established new maximum prices (7 Fed. Reg. 10381).

Both regulations established maximum prices for wholesale cuts of beef and veal, and both adopted the period March 16–28, 1942, as the base period for ascertaining the maximum permitted prices. The earlier regulation established maxima for each vendor based on his own prices during the base period; the later regulation established dollars-and-cents maxima by zones, based on prices generally prevailing therein during the base period.

apply in the case of revocation of an administrative regulation. (R. 27–29.)

On March 31, 1943, the district court entered an order that the indictment "be and it hereby is quashed," and on April 30, 1943, it allowed the United States an appeal to this Court from its order of March 31, 1943 (R. 29, 30).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

(1) In holding that criminal liability for violation of a regulation issued under the Emergency Price Control Act of 1942 was extinguished by revocation of the regulation prior to the return of the indictment.

(2) In holding that Section 13 of the Revised Statutes did not prevent the release of criminal liability for violation of a regulation revoked prior to the return of the indictment.

(3) In sustaining the defendants' motions to quash the indictment.

SUMMARY OF ARGUMENT

I

A. The judgment quashing the indictment entered on March 31, 1943, was the court's "decision or judgment" within the meaning of the Criminal Appeals Act, and the present appeal is therefore timely. Under circumstances precisely like those in the present case, this Court has uniformly taken jurisdiction of appeals under the

Criminal Appeals Act. To construe the words "decision or judgment" as meaning the court's formal order of judgment avoids the serious ambiguities and uncertainty as to the time and basis for appeal which would result from a contrary conclusion. In any event, even if the district court originally intended to incorporate its judgment in its opinion, it superseded such judgment by its later formal order of judgment. The present appeal is therefore timely since, when a court vacates its judgment during the term, the time for appeal runs from the date of the superseding judgment.

B. This Court has jurisdiction under the provisions of the Criminal Appeals Act authorizing direct review of a judgment "sustaining a special plea in bar." Whether the judgment is of this character is to be determined not by form, but by substance. *United States* v. *Goldman*, 277 U. S. 229, 236. If its effect is to bar further prosecution for the offense charged it is in substance one sustaining a plea in bar whatever the designation of the plea upon which the court acted. In the present case the plea sustained was not based on any defect in the indictment or any irregularity in the grand jury proceedings, and it sought not a mere abatement of the indictment but a complete bar against further prosecution. This Court has taken jurisdiction under the Criminal Appeals Act of an appeal from a judgment sustain-

ing the defense, presented by a plea designated a plea in abatement, that termination of the statute upon which the indictment was founded barred further prosecution. *United States* v. *Chambers*, 291 U. S. 217.

This Court also has jurisdiction under the provisions of the Criminal Appeals Act authorizing appeal to it from a judgment quashing an indictment where the decision was based upon the construction of the statute on which the indictment was founded. The district court's decision was based on its construction of the provisions of the Emergency Price Control Act of 1942 which penalize violations of regulations of the Price Administrator, namely, that these provisions do not authorize continuance of prosecution after the violated regulation has been revoked. Cf. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304. The statute was not the less construed because it was construed in the light of the application to it of certain general principles of statutory construction. See *United States* v. *Borden Co.*, 308 U. S. 188, 195.

II

The basis for the rule that, in the absence of a saving provision, the repeal of a statute terminates the right to prosecute for prior violations is that if the prosecution continues there must be a continuing statute to vivify it. But where the statute, as in the present case, provides for con-

tinuing price control through the medium of varying administrative regulations and penalizes willful violations of such regulations there is a continuing statute vivifying prosecution notwithstanding revocation of the violated regulation. In such a case, it is the statute which establishes the crime and imposes the penalty. Revocation of a particular regulation is not a *pro tanto* repeal of the statute. This Court has held that, under a statute authorizing issuance of a presidential proclamation and making it an offense to violate any proclamation so issued, revocation of the proclamation does not terminate liability for violations committed while the proclamation remained in force. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304.

Whatever presumption of forgiveness for past offenses may attach to the repeal of a statute, no such presumption arises where the policy which Congress has laid down, and which is to be carried into effect through the medium of administrative regulations, is as much in force at the time of prosecution as at the time the alleged offense was committed. Moreover, it cannot be presumed that Congress intended that the penalties which it imposed for willful violation of the regulations of the Price Administrator should be largely ineffective, a result which would follow from the district court's construction of the statute. Under this construction, violators of price regulations could escape punishment by the simple ex-

pedient of keeping the proceedings against them alive in the courts until the necessities of administration called for issuance of a new and different regulation constituting, in legal effect, a revocation of the violated regulation.

The district court's theory was that since regulations of the Price Administrator are a step in the legislative process, they are to be subsumed under the general rules of law applicable to the repeal of statutes. We submit that if this theory is correct, the regulations must also be assimilated to the statute for the purpose of determining the application of Section 13 of the Revised Statutes, which provides that prosecutions for past offenses may be maintained notwithstanding the repeal of a statute unless the repealing statute expressly provides otherwise. Accordingly, consistent application of the theory of the decision below would bring the present prosecution within the saving provisions of Section 13. The section has been held applicable to revoked administrative regulations.

ARGUMENT

I

THIS COURT HAS JURISDICTION UNDER THE CRIMINAL APPEALS ACT

A. THE APPEAL WAS TAKEN WITHIN THE TIME PRESCRIBED BY THE CRIMINAL APPEALS ACT

The district court filed an opinion on March 5, 1943, stating its reasons for holding that appellees

could not be required to answer the indictment, and at the end of the opinion the court epitomized the conclusion which it had reached on appellees' motions to quash by stating: "The motion to quash is granted" (R. 29). On March 31, 1943, the court gave effect to this conclusion by entering the following judgment (R. 29):

> This cause came on to be heard upon the defendant's motion to quash the indictment * * *. * * *. After hearing arguments of counsel for the defendant and of the United States Attorney, it is
>
> Ordered that the indictment be and it hereby is quashed on the ground that the Regulation alleged to have been violated was revoked prior to the return of the indictment.

On April 30, 1943, the United States petitioned for allowance of an appeal from the order "quashing the indictment" entered on March 31, 1943. The court on the same day allowed an appeal from this order. (R. 29, 30.)

Appellees in their statement opposing jurisdiction on appeal have taken the position that the decision on the motion to quash was made on March 5, 1943, when the district court filed its opinion, and that the appeal is therefore not timely under the requirement of the Criminal Appeals Act (*infra*, p. 35) that all appeals thereunder to this Court "shall be taken within thirty days after the decision or judgment has been ren-

dered." The Government submits that the time for appeal commenced to run from the entry of judgment on March 31, 1943.

The precise question was argued and disposed of by this Court in two cases at recent Terms. In *United States* v. *Resnick*, 299 U. S. 207, the opinion of the district court on demurrer to an indictment concluded: "* * * the Demurrer is, therefore, sustained." That opinion was filed March 11, 1936. On April 14, 1936, a formal order was entered sustaining the demurrer. The petition for appeal was filed April 14 and allowed the same day. The question of its timeliness was raised by motion to dismiss, and was fully argued on both sides. This Court postponed further consideration of the question of its jurisdiction to the hearing of the case on the merits; the Court entertained the appeal and did not further advert to the question of its timeliness. Subsequently, in *United States* v. *Midstate Horticultural Company*, 306 U. S. 161, the same issue was presented. An opinion was filed on June 16, 1938, concluding: "* * * the demurrers are sustained." On July 2, 1938, an order sustaining the demurrer was entered. Petition for appeal was filed and allowed on July 20, 1938. Appellees moved to dismiss in this Court. The Court noted probable jurisdiction, and in its opinion (p. 163, footnote 2) explained its denial of the motions to dismiss, stating: "The appeals were from the judgments and

orders of July 2, and not the previous written opinion."

These decisions appear to reflect the unbroken practice of this Court. As the Court is aware, the district courts almost invariably enter a formal order or judgment sustaining a demurrer to an indictment after an opinion has been rendered concluding that the demurrer is sustained.[6] In a number of cases under the Criminal Appeals Act in which no objection was urged to the jurisdiction of this Court, the timeliness of the appeal depended in fact on an acceptance of the formal order or judgment as an appealable decision, after an opinion had been rendered reciting that the demurrer was sustained:[7]

---

[6] The concurring opinion in *United States* v. *Swift & Co.*, 318 U. S. 442, 446, assumes that when a district court sustains a demurrer to an indictment its judgment will be embodied in a formal order.

[7] In *United States* v. *Bowman*, 260 U. S. 94, an opinion was filed February 16, 1921, concluding: "Demurrer sustained." A formal order sustaining the demurrer was entered and filed March 25, 1921. Petition for writ of error was filed March 30, 1921.

In *United States* v. *Katz*, 271 U. S. 354, an opinion was filed April 29, 1925, concluding: "* * * the demurrers are therefore sustained and the indictments quashed." An order sustaining the demurrers was dated and filed July 6, 1925. Petition for writ of error was filed on the latter date.

In *United States* v. *Borden Co.*, 308 U. S. 188, an opinion was filed July 13, 1939, concluding that the demurrers "must be sustained." An order sustaining the demurrers was filed July 28, 1939. Petition for appeal was filed August 17, 1939.

Compare also *United States* v. *Lanza*, 260 U. S. 377, in which an opinion was filed October 18, 1920, concluding: "The

These precedents, it is submitted, are entirely sound. An opinion of a court announcing its conclusion and the reasons therefor does not constitute its judgment.[1] Particularly in applying a statute regulating the right of appeal, a construction is to be favored which will avoid unnecessary uncertainty and which will promote uniformity within the federal judicial system. This result is achieved by construing the phrase "decision or judgment" in the Criminal Appeals Act as referring to the formal judgment entered as such, at least where such a judgment is in fact entered.[2]

---

plea to ≡5245 and ≡5568 is sustained, and to ≡5350, 5573, and 5570 is overruled." An order sustaining the pleas was entered January 24, 1921. Petition for a writ of error was filed February 2, 1921. This case may be distinguishable in that the pleas set up facts in bar and were held sufficient but the Government may have been given an opportunity to answer the pleas on the facts before the final order was entered.

[1] 1 Freeman, *Judgments* (5th ed.), sec. 3; *G. Amsinck & Co. v. Springfield Grocery Co.*, 7 F. (2d) 855, 858 (C. C. A. 8). In the federal courts an opinion is not part of the record proper and it is included in the transcript certified to the appellate court only as required by rules of court. *England v. Gebhardt*, 112 U. S. 502, 506; *Childs v. Williams*, 212 Fed. 151, 152 (C. C. A. 8); *Mutual Reserve Fund Life Ass'n v. DuBois*, 85 Fed. 586, 589 (C. C. A. 9), certiorari denied, 171 U. S. 688; 6 Longsdorf, *Cyclopedia of Federal Procedure*, p. 214.

[2] "Decision or judgment" is undoubtedly employed to mean judgment or its equivalent, *e. g.*, decree or order. Cf. *Ex parte Tiffany*, 252 U. S. 32, 36.

Section 238 of the Judicial Code (28 U. S. C. sec. 345) provides that there may be direct review by this Court of a

Any other construction would give rise to troublesome questions as to the time and basis for appeal. An appellant would have to determine at its peril whether the court's opinion is its judgment (a) when a statement like that made in the present case appears in the body of the opinion rather than at the end, (b) when it is not separately paragraphed, (c) when the grounds for the ruling are set forth in the same sentence, (d) when the words used are "must be sustained" rather than "is sustained," (e) when the opinion is oral.[2]

Even if it be assumed, *arguendo*, that an appeal might have been taken from the action of the district court when its opinion was rendered on March 5, 1943, for reasons of local practice or otherwise, that conclusion would not preclude the entry of a subsequent conventional judgment and appeal therefrom. The ascertainment of the final judgment must be made from the proceedings as a whole. Here it is evident that the district court regarded its judgment of March 31, 1943, as the operative judgment of the court, since two judgments covering the same subject matter could not

---

"judgment or decree" of a district court in five classes of cases. One of the classes thus enumerated is that of cases within the Criminal Appeals Act.

[2] To take an appeal in all cases within 30 days from the court's opinion offers no sure solution of the above problems. An appeal from the opinion when the opinion was not in fact the court's "decision or judgment" might be held to be made on a basis not authorized by the Criminal Appeals Act and therefore subject to dismissal.

be outstanding in the same cause. Moreover, the court's allowance of an appeal from the judgment of March 31, 1943, likewise amounted to a declaration that its opinion of March 5, 1943, was not its "decision or judgment." In these circumstances, it seems unnecessary to determine whether an appeal could have been taken from the earlier action of the court if no formal judgment had later been entered. As was said by this Court in *Rubber Company* v. *Goodyear*, 6 Wall. 153, 155–156, concerning a similar situation: "We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree." See also *Silsby* v. *Foote*, 20 How. 290, 295, indicating that an appeal might be taken, alternatively, from the pronouncement and entry of a decree or from the signing of the decree by the judge.

Finally, if the action of the court on March 5, 1943, were deemed to be appealable as a judgment, the subsequent signing of a judgment by the district judge amounted to a vacation of that decree and the entry of a fresh judgment. Viewed in this light, the vacation occurred during the term of court, prior to the expiration of the time for appeal, and for cause shown. The occasion

for the court's entry of a judgment on March 31, 1943, is explained in a letter from the deputy clerk of the district court which is copied in Appendix B, *infra*, pp. 42–46. As will there be seen, the United States Attorney applied for the formal order because of prejudicial delay in making an entry in the Court's records to the effect that the indictment was quashed.[11] The trial court retained control over the cause for this purpose,[12] and the judgment thereupon entered become the final judgment, from which the time for appeal commenced. *Union Guardian Trust Co.* v. *Jastromb*, 47 F. (2d) 689 (C. C. A. 6).

In sum, we submit that the judgment of March 31, 1943, and not the opinion of March 5, 1943, constituted the "decision or judgment" of the court for purposes of appeal; that even if the opinion could be deemed to have furnished an appealable decision or judgment without more, it did not preclude the entry of a conventional and effective judgment which would in turn be appeal-

[11] The entry was not made until a date between March 25 and 29, while it was dated March 5, as appears from the transcript certified to this Court. As this entry was stricken through, it was not included in the printed record among the docket entries (cf. R. 33).

[12] Compare the practice of this Court, where there has been a justifiable misunderstanding in the court below or other good cause, of vacating the decree below in order that a fresh decree may be entered from which a timely appeal to the proper court may be taken. See *Oklahoma Gas & Electric Company* v. *Oklahoma Packing Company*, 292 U. S. 386, 392; *Phillips* v. *United States*, 312 U. S. 246, 254.

able; and that, in any event, the earlier action of the court was properly superseded by its entry of judgment.

B. THE CASE IS ONE IN WHICH THE CRIMINAL APPEALS ACT AUTHORIZES A DIRECT APPEAL TO THIS COURT

The court below held that the Emergency Price Control Act did not authorize the maintenance of prosecutions for violation of a regulation after the regulation has been revoked or superseded. From this holding an appeal lies to this Court under either of two provisions of the Criminal Appeals Act: the provisions authorizing appeals from a judgment of a district court (a) "sustaining a special plea in bar, when the defendant has not been put in jeopardy," and (b) quashing an indictment "where such decision or judgment is based upon the * * * construction of the statute upon which the indictment or information is founded."

(a) The pleas sustained in the present case, while contained in so-called "motions to quash" (R. 12, 16, 17, 20), were in substance pleas in bar, and the decision thereon is directly appealable. Pleas raising the defense, for example, of the statute of limitations or former acquittal, though denominated pleas in abatement or motions to quash, are in substance pleas in bar and so comprehended within this provision of the Criminal Appeals Act. The governing criterion is not form but substance, as was made clear in *United States v. Goldman*, 277 U. S. 229, 236–237:

Whether the judgment sustaining the motion of the defendants in error and dismissing the information on the ground that the prosecution was barred by the statute of limitations, was a "judgment sustaining a special plea in bar" within the meaning of the Act, is to be determined not by form but by substance. *United States* v. *Thompson*, 251 U. S. 407, 412. The material question in such cases is the effect of the ruling sought to be reviewed. It is immaterial that the plea was erroneously designated as a plea in abatement instead of a plea in bar. *United States* v. *Barber*, 219 U. S. 72, 78, or that the ruling took the form of granting a motion to quash which was in substance a plea in bar, *United States* v. *Oppenheimer*, 242 U. S. 85, 86, *United States* v. *Thompson*, *supra*, 412. Here the motion to dismiss raised the bar of the statute of limitations upon the facts appearing on the face of the information, and was equivalent to a special plea in bar setting up such facts. And the effect of sustaining the motion was the same as if such a special plea in bar had been interposed and sustained.

In the present case the defense which the district court sustained was clearly one in bar. If the effect of the judgment, "unless reversed, is to bar further prosecution for the offense charged," it "follows unquestionably that, without regard to the particular designation or form of the plea or its propriety," this Court has jurisdiction under the provisions of the Criminal Appeals Act an-

thorizing direct appeal to it from a decision or judgment sustaining a special plea in bar. *United States* v. *Murdock*, 284 U. S. 141, 147. The court below held that the power to prosecute appellees for violation of Maximum Price Regulation No. 169 terminated with the revocation of this regulation. The plea which the court sustained was not based on the insufficiency of the indictment or on irregularities in the grand jury proceedings. The plea sought, not merely an abatement of the indictment, but a complete bar to any further prosecution for the offenses charged. The defense sustained, in the nature of confession and avoidance, was directed to the merits of the charges laid in the indictment, that is, that upon the facts set forth in appellees' motions they could not be held to answer the offenses charged. In substance, therefore, the judgment of the district court was a judgment sustaining a special plea in bar.[13]

In *United States* v. *Chambers*, 291 U. S. 217, this Court entertained an appeal under the Criminal Appeals Act under circumstances substantially like those here. In that case Chambers, one of two defendants indicted for conspiring to violate the National Prohibition Act, pleaded guilty but imposition of judgment was deferred. After ratification of the Twenty-first Amendment he filed a plea in abatement, and the other defendant filed

[13] "By a plea in bar the defendant shows, by matter extrinsic of the record, that the indictment is not maintainable." 2 Bishop, *New Criminal Procedure* (2nd ed.), sec. 742.

a demurrer, upon the ground that repeal of the Eighteenth Amendment deprived the court of jurisdiction to prosecute the charge against them. The district court sustained this contention and entered judgment dismissing the indictment as to both defendants. The Government in its jurisdictional statement supported jurisdiction on appeal as to Chambers upon the ground that the judgment of the district court was in substance a judgment "sustaining a special plea in bar."[11]

(b) The Government also submits that this Court has jurisdiction under the provisions of the Criminal Appeals Act authorizing direct appeal to it from the decision or judgment of a district court quashing an indictment where the decision or judgment is based upon the construction of the statute upon which the indictment is founded.

The district court construed the penalties imposed by Section 205 (b) of the Emergency Price Control Act of 1942, the statute on which the indictment was founded, as being applicable only to regulations of the Price Administrator which are in force at the time of prosecution. The fact

[11] The jurisdictional statement also urged that since the purpose of the plea in abatement was to arrest the judgment which the court would ordinarily have entered upon the plea of guilty, the case came within the provisions of the Criminal Appeals Act authorizing appeal from "a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

that the court was led to its conclusion as to the meaning of the statute by the application of certain general legal principles in the nature of a presumption, rather than by an interpretation of the particular phraseology of the Price Control Act, is immaterial. In *United States* v. *Borden Co.*, 308 U. S. 188, the ground upon which the district court sustained a demurrer to an indictment charging a conspiracy to restrain interstate commerce in milk was that subsequent federal legislation had removed agricultural products, including milk, from the purview of the Sherman Act. Although this decision involved no interpretation of the specific provisions or language of the Sherman Act, this Court, in taking jurisdiction under the Criminal Appeals Act, said (p. 195) that "the Sherman Act was not the less construed because it was construed in the light of the subsequent legislation." So here, the Price Control Act was not the less construed because it was construed in the light of the supposed application to it of certain general principles of statutory construction.[13]

United States v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, confirms our position. That case was an appeal from a decision sustaining a demurrer to an indictment upon the ground that

[13] The fact that the court below suggested (R. 28) that perhaps a saving clause by the Administrator would have been authorized and effective, does not affect this conclusion. The court held that Section 205 (b) of the Act does not, *ex proprio vigore*, authorize the present prosecution.

the statute upon which it was founded was invalid. The demurrer also sought relief from prosecution upon substantially the same ground as that upon which the district court based its decision in the present case, namely, that the proclamation of the President which the defendants were charged with conspiring to violate had been revoked prior to the return of the indictment. This Court considered and passed upon this ground of demurrer, which the district court had rejected, and based its assumption of jurisdiction (see p. 330) upon the ground that the issue presented constituted "a proper subject of review by this court under the Criminal Appeals Act."[17]

Thus the very cases which have dealt most recently with the problem presented here on the merits—the *Chambers* and *Curtiss-Wright* cases—reached this Court under the Criminal Appeals Act.

[16] The proclamation was issued under the authority of a Joint Resolution of Congress, which penalized violation of any Presidential proclamation issued thereunder.

[17] The significance of this holding is not affected by the fact that the case was otherwise properly before this Court under the Criminal Appeals Act. The rule had been settled that the Criminal Appeals Act vests this Court with jurisdiction to review only decisions "concerning the subjects embraced within the clauses of the statute" and that appeal thereunder does not "open here the whole case." *United States* v. *Keitel*, 211 U. S. 370, 398–399; *United States* v. *Kissel*, 218 U. S. 601, 606; see *United States* v. *Borden Co.*, 308 U. S. 188, 193.

II

REVOCATION OF MAXIMUM PRICE REGULATION NO. 169 DID NOT TERMINATE LIABILITY FOR VIOLATIONS THEREOF COMMITTED PRIOR TO REVOCATION

The district court held that the rule that the repeal of a statute terminates the power to prosecute for prior violations (unless the legislature has kept that statute alive for this purpose) applies to revoked administrative regulations. The reason behind the rule is that "if the prosecution continues the law must continue to vivify it" (*United States* v. *Chambers*, 291 U. S. at 226) or, as stated in *United States* v. *Tynen*, 11 Wall. 88, 95:

> There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. * * *

An entirely different situation is presented when prosecution for violation of an administrative regulation is commenced or continued after the regulation has been revoked. Revocation or amendment of the regulation does not and could not repeal the statutory provisions. While the regulation was necessary to call the statutory penalties into play, it is the statute, not the regulation, which establishes the crime and fixes the penalty.[15] Notwithstanding revocation of the reg-

[15] In *United States* v. *Grimaud*, 220 U. S. 506, this Court, in upholding the constitutionality of a statute authorizing the promulgation of certain administrative regulations and making violation thereof a crime, said (p. 522): "A viola-

ulation there is a continuing statute vitalizing the prosecution of violations of the statute committed while the regulation remained in force. The only effect of revocation is that the particular acts which the regulation prohibited would not, if done thereafter, constitute a violation of the statute.

United States v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, is, we submit, controlling on the question.[19] A Joint Resolution of Congress provided that if the President found that prohibition of the sale of arms and munitions of war to countries engaged in armed conflict in the Chaco might contribute to peace between these countries and make a proclamation to that effect, it should be unlawful to sell such articles to the countries engaged in this conflict until otherwise ordered by the President or by Congress. The defendants demurred to an indictment charging a conspiracy to sell arms of war in violation of the Joint Resolution and of the President's proclamation thereunder, upon the ground that the President had revoked his proclamation prior to the return of the indictment. This Court held that revocation of the proclamation did not terminate liability for offenses committed while it had been in effect. It

---

tion of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty."

[19] The opinion of the court below does not discuss or cite the *Curtiss-Wright* case.

said (p. 332) that when the President revoked his first proclamation the Joint Resolution "ceased to be a rule for the future" but it "did not cease to be the law for the antecedent period of time." The Court also said (pp. 331–332):

> It was not within the power of the President to repeal the Joint Resolution; and his second proclamation did not purport to do so. It "revoked" the first proclamation; and the question is, did the revocation of the proclamation have the effect of abrogating the resolution or of precluding its enforcement in so far as that involved the prosecution and punishment of offenses committed during the life of the first proclamation? We are of opinion that it did not.
>
> * * * The second proclamation did not put an end to the law or affect what had been done in violation of the law. The effect of the proclamation was simply to remove for the future, a condition of affairs which admitted of its exercise.

While the President's second proclamation contained a proviso that revocation of the original proclamation should not extinguish any penalty incurred thereunder or under the joint resolution of Congress, this Court, in discussing the effect of revocation, did not mention this saving clause.[2] The clause was not merely immaterial; the whole tenor of this Court's opinion makes it

[2] Cf. *United States* v. *Curtiss-Wright Export Corp.*, 14 F. Supp. 230, 237 (S. D. N. Y.), where the point is discussed.

plain that, as Congress had defined the offense and specified the penalties, there was no room for executive action either saving prosecutions on the one hand or granting legal immunity on the other. Congress did not delegate, any more than in the ordinary criminal statute, authority to determine the duration of liability for conduct which Congress declared to be criminal.

Barker v. *United States*, 86 F. (2d) 284 (C. C. A. 8), decided shortly prior to the decision of this Court in the *Curtiss-Wright* case, is also directly in point. The defendants in the *Barker* case were indicted for conspiring to transport intoxicating liquors into Arkansas in violation of a federal statute making it unlawful to transport intoxicating liquors into any State the law of which prohibited manufacture or sale of intoxicating liquors for other than beverage purposes. The court rejected the defense that the prosecution could not be maintained because the Arkansas statute prohibiting manufacture and sale of intoxicating liquors had been repealed, saying (p. 285):

> Congress having made it a crime to import liquor into a state for beverage purposes while the laws of the state prohibit the manufacture or sale therein of such liquor, such crime is complete when the importation takes place. No repeal of its prohibitory laws by the state thereafter could constitute a forgiveness of the federal offense or deprive the United States and its courts of the right to prosecute and to try those

> charged therewith. * * * All importations of intoxicating liquor into Arkansas for beverage purposes prior to March 16, 1935, were offenses against the United States and remained such after the repeal. * * *

One reason given for the rule that the repeal of a statute terminates the right to prosecute for violations thereof is that, by the repeal, "the legislative will is expressed that no further proceedings be had under the act repealed" (*United States* v. *Tynen, supra*, p. 95).[21] The underlying reason for this rule is, we take it, that the repeal is presumed to indicate so basic a change in the sense of the community that it no longer condemns the conduct previously prohibited and therefore does not wish to continue the prosecution of prior offenses. But where a statute like the Emergency Price Control Act of 1942 provides for continuing price control through the medium of varying administrative orders and regulations, the purpose in penalizing violations of the regulations is to assure obedience to those currently in effect, and there is no basis for presuming that Congress intended that amendment or revocation of any particular regulation should be a grant of amnesty for prior violations.

Congress, of course, could have provided that any prosecution for violation of an administrative regulation issued under the Price Control Act

[21] In *Maryland* v. *B. & O. R. R. Co.*, 3 How. 534, 552, the Court said, "The repeal of the law imposing the penalty, is of itself a remission."

should terminate upon revocation of the regulation. Possibly the courts might infer that Congress intended the statute to have this effect if there were compelling policy considerations for doing so. Considerations of policy, however, point in the opposite direction. That the fixing of maximum prices under the standards set by the Price Control Act [22] requires a high degree of flexibility in administration, with periodic revisions of maximum price determinations to give effect to the results of changing conditions, practical experience, or further data or study, would seem to be a matter of judicial notice.[23] The statute itself contains numerous provisions which expressly authorize or provide for revision of the Administrator's maximum price determinations, and the statute prescribes in detail the procedure for securing revision or adjustment.[24] It is not

[22] The general standard in Section 2 (a) is that the Administrator establish such maximum price "as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act," but in applying this standard the Administrator is directed to give consideration to many complex factors. See Secs. 1 (a), 2 (a), 3 (a)–(c).

[23] The Office of Price Administration has advised the Department that since the enactment of the Emergency Price Control Act of 1942 more than 400 regulations have been issued, followed by thousands of revisions and amendments promulgated as conditions dictated such revision or amendment.

[24] The Administrator is directed, upon request by any substantial portion of an industry subject to maximum price regulation, to appoint an industry advisory committee and to consult with the committee with respect to the regulation and "adjustments therein" (Sec. 2 (a)). He is authorized

to be supposed that Congress intended to coddle wilful violators of wartime price controls by holding out the prospect that as the administrative machinery functioned it would inevitably produce reprieves for wilful violations.

If the so-called common-law rule regarding the effect of repeal of a statute were applicable, the criminal sanctions of the Act would be rendered largely ineffective. It would be necessary to reckon with the rule that the enactment of a statute containing provisions inconsistent with those of an earlier statute is a repeal of the latter.[25] It would follow that every substantial revision of a regulation would constitute a revocation. Since

---

to issue "temporary regulations" fixing maximum prices without observing the provisions generally applicable to exercise of his price-fixing powers, but any such temporary regulation, which is to be effective for not more than 60 days, may be "replaced by" a regulation issued in accordance with the prior provisions of the subsection (Sec. 2 (a)).

If a protest against a price regulation is filed the Administrator may grant or deny it in whole or in part (Sec. 203 (a)). If the protest is not fully granted a complaint may be filed with the Emergency Court of Appeals, which is authorized to "set aside" the regulation in whole or in part, and the regulation may be "modified or rescinded" by the Administrator at any time during the pendency of such complaint (Sec. 204 (a)).

After the Administrator authorized by the act takes office, any maximum price schedule previously issued by certain named officials shall have the same effect as if issued under Section 2 of the act until such schedule is "superseded by" action taken pursuant to Section 2 (Sec. 206).

[25] *United States* v. *Tynen*, *supra*; *Norris* v. *Crocker*, 13 How. 429, 440; *Gulf, C. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503, 506.

the rule applies not only to prosecutions begun after repeal but also to those pending in a trial or appellate court at time of repeal,[28] violators of a maximum price regulation could, if revocation terminates the power to prosecute, escape punishment by the simple expedient of keeping the court proceedings alive until the violated regulation has been superseded. It is not reasonable to assume that Congress, when it imposed criminal penalties for willful violations of the Administrator's maximum price regulations, intended that these penalties should be largely ineffective.

Congress disclosed its intention with respect to past violations of presently inoperative regulations by making provision for the situation which alone would raise a genuine problem: the repeal or termination of the Act itself. Congress expressly provided (Sec. 1 (b)) that the repeal, or the termination of the Act by time limitation, shall not affect prosecutions for prior violations, and that all "regulations, orders, price schedules, and requirements" under the Act "shall be treated as still remaining in force for the purpose of sustaining" such prosecutions. The fact that Congress took pains to assure that the repeal or expiration of the entire statute should not terminate prosecutions for prior violations of the

[28] *United States* v. *Tynen*, *supra*; pp. 92–94; *Norris* v. *Crocker*, *supra*; pp. 439–440.

regulations is a clear indication that, *a fortiori*, Congress did not intend the mere revocation of such regulations during the life of the statute to destroy the power to penalize prior willful violations.

The apparent theory of the court below was that, since the issuance of maximum price regulations is a step in the legislative process, the effect of revocation is to be determined by the rule governing the repeal of a statute. If it be assumed *arguendo* that this theory is correct and that, for the purpose of determining the effect of revocation, the administrative regulation is to be assimilated to the statute under which it is issued, we submit that, upon the same theory, it must also be assimilated to the statute for the purpose of determining the application of Section 13 of the Revised Statutes.

Section 13 (*infra*, p. 41) provides that the repeal of a statute shall not extinguish any penalty incurred thereunder unless the repealing act expressly so provides. It has been held to apply where the basis for prosecution or liability is a revoked administrative regulation.

In *Landen* v. *United States*, 299 Fed. 75 (C. C. A. 6), the indictment charged a conspiracy to sell intoxicating liquor in excess of the amounts permitted by a regulation issued by the Secretary of the Treasury which had been revoked prior to the prosecution. The court held (p. 78) that even if

there were effective analogy between statutory repeal and abrogation of an administrative regulation, the right to maintain the prosecution was preserved by Section 13, R. S., which had abolished the common-law rule as to statutory repeal.[27] State decisions have taken the same view.[28]

---

[27] Cf. *DeFour* v. *United States*, 260 Fed. 596, 599–600 (C. C. A. 9), certiorari denied, 253 U. S. 487; *Goublin* v. *United States*, 261 Fed. 5 (C. C. A. 9).

[28] *United States* v. *Williams*, 8 Mont. 85, was a suit to recover for the value of timber cut on the public domain. A statute permitted cutting such timber subject to such rules and regulations as the Secretary of the Interior might prescribe. It was held that liability for cutting timber in violation of the regulations of the Secretary then in force was not affected by the fact that the regulations violated had later been revoked. The court said (pp. 94–95) that any doubt as to the plaintiff's right to maintain the suit was settled by Section 13, R. S., that the Secretary's regulations became "*sub modo* a part of the act of Congress itself" and therefore came within the provisions of Section 13 relating to the repeal of statutes.

In *People* v. *Moynihan*, 200 N. Y. S. 434, 439–440, prosecution for violation of a revoked administrative regulation was upheld upon the ground that prosecution was saved by a section of the General Construction Law of New York similar in its terms to Section 13 of the Revised Statutes.

CONCLUSION

It is respectfully submitted that the judgment of the district court should be reversed.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
CHARLES H. WESTON,
PAUL A. FREUND,
Special Assistants to the Attorney General.
FLEMING JAMES, JR.,
Chief, Litigation Branch,
DAVID LONDON,
SAUL N. RITTENBERG,
Office of Price Administration.

OCTOBER 1943.

APPENDIX

The Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C. Supp. II, sec. 682, provides in part as follows:

> That an appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.
>
> * * * * *
>
> The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

The Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. App. Supp. II, sec. 901 *et seq.*, called the Emergency Price Control Act of 1942, provides in part as follows:

> SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *
>
> (b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on

June 30, 1943,[1] or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

* * * * *

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or

[1] By the Act of October 2, 1942, 56 Stat. 767, the date June 30, 1944, was substituted for June 30, 1943.

other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. * * * In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such

action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

* * * * *

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 * * *.

* * * * *

SEC. 203 (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in sup-

port of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection * * * the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * * Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,*

That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. * * *

* * * * * *

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

* * * * * *

SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. * * *

Section 13 of the Revised Statutes, 1 U. S. C. sec. 29, provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

APPENDIX B

DISTRICT COURT OF THE UNITED STATES

District of Massachusetts

Office of the Clerk

1525 Federal Building, Boston

JULY 29, 1943.

JOHN HENRY LEWIN, Esq.,
Acting Assistant Attorney General, Department of Justice, Washington, D. C.

Re: *United States* v. *Jacob Hark et al.* File—KLK 146-18-50-4.

DEAR SIR: The United States Attorney has handed me your letter of July 20, 1943, relating to the case of *United States* v. *Jacob Hark et al.*, in which you request a letter about the docket entry of March 5th in that case.

On March 5th Judge Sweeney handed down an opinion granting the defendant's motion to quash. The practice in this District, on the receipt of an opinion granting a motion to quash, is to make an entry on the docket under the judge's name, "Indictment quashed." It is not the practice to have a written order.

When a certified copy of the docket entries was given to the United States Attorney on March 25 to be used on the appeal, no entry quashing the

indictment under date of March 5 had then been made. This entry was made shortly thereafter. It was made without any consultation with the judge and the judge had no knowledge, so far as I know, of the exact language of the entry.

On March 29 the United States Attorney advised us that he had been unable to file an appeal because there was no docket entry quashing the indictment. He was surprised to see that between March 25 and March 29 the entry had been made. He then asked the judge for a written order quashing the indictment. The judge granted the request and when an order was presented to him on March 31, he directed that it be entered. The order was noted on the docket under that date. The judge gave no directions about the striking of the original entry, so far as I can recollect, but he was told that it had been stricken out.

Respectfully yours,

ARTHUR M. BROWN,
Deputy Clerk.

AMB–JDF.

U. S. GOVERNMENT PRINTING OFFICE 1943

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1068

THE UNITED STATES OF AMERICA
Appellant,

vs.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1068

THE UNITED STATES OF AMERICA,
Appellant,

vs.

JACOB HARK AND HYMAN YAFFEE, COPARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

APPELLEES' STATEMENT OPPOSING JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE DISTRICT OF MASSACHUSETTS AND MOTION TO DISMISS.

The Appellees move to dismiss the appeal herein, on the grounds that the Supreme Court of the United States has no jurisdiction.

Statement Against Jurisdiction.

Under Rule 12, Paragraph 3 of the Supreme Court of the United States in support of the motion to dismiss and in opposition to the jurisdiction of the Supreme Court of

the United States, Appellees submit the following statement disclosing matters or grounds making against the jurisdiction of the Supreme Court of the United States.

The United States attempts to appeal from a decision or finding of the United States District Court for the District of Massachusetts quashing the indictment in the above-captioned matter.

The jurisdiction of the Supreme Court on an appeal is limited to those matters set forth in the Act of March 2, 1907 as amended by the Act of May 9, 1942 (34 Stat. 1246; 56 Stat. 401; 18 U. S. C. 682) commonly known as the Criminal Appeals Act.

This court has jurisdiction only if the decision or judgment of the District Court is based upon the invalidity or construction of the Statute upon which the indictment was founded, or from a decision or judgment sustaining a special Plea in Bar when the defendant has not been put in jeopardy.

The court below rendered a written opinion quashing the indictment. The Appellant's statement of jurisdiction indicates that it is relying upon that portion of the Criminal Appeals Act which relates to an appeal from a special Plea in Bar. The Appellees say:

I. That the appeal was not seasonably taken within thirty days, in that the finding and decision upon the motion to quash was made on March 5, 1943 as appears from the opinion itself and the original docket entries in the court.

II. The attempts of the Appellant to stretch the limitation rule of thirty days within which an appeal must be taken by the United States, by having an additional and unnecessary order made by the court bearing date of March 31, 1943, did not as a matter of law extend the time within which an appeal could

be taken from the finding and decision of March 5, 1943.

III. The appeal is not based upon the invalidity or construction of the Statute upon which the information or indictment is founded.

IV. The motion to quash does not constitute a special Plea in Bar within the meaning of the Criminal Appeals Act.

It is respectfully submitted that the Appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

(Signed) LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Attorneys for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 83.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR APPELLEES.

LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Attorneys for Appellees.

ADDISON C. GILCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

STATUTES, ETC.

TEXTS.

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 83.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE APPELLEES.

Opinion Below.

The opinion of the District Court (R. 25) is reported in 49 F. Supp. 95.

Jurisdiction.

It is the contention of the appellees that this court is without jurisdiction to determine the appeal. On June 21, 1943, this court postponed further consideration of the appellees' motion to dismiss, until hearing of the case on

the merits (R. 34). From a decision or judgment of the District Court of the United States for the District of Massachusetts, quashing an indictment against Jacob Hark and Hyman Yaffee, the Government claims a direct appeal under the so-called Criminal Appeals Act of March 2, 1902, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U.S.C. sec. 682, and section 238 of the Judicial Code as amended, 28 U.S.C. sec. 345.

Case Stated.

By indictment returned on December 21, 1942, and numbered 16021 on the criminal docket of the District Court, Jacob Hark and Hyman Yaffee were charged with violating section 1364.51 of Maximum Price Regulation No. 169, as amended, allegedly issued by the Office of Price Administration pursuant to the Emergency Price Control Act of 1942,[1] in that they sold wholesale cuts of beef at prices higher than the maximum established by section 1364.52 of said regulation. A motion to quash was filed in behalf of the appellee Hark on January 4, 1943 (R. 12-16), and a motion raising the same points and identical in language was filed in behalf of the appellee Yaffee on the same day (R. 17-20). The motions to quash were heard by Sweeney, J., of the District Court on January 16, 1943. An opinion and decision thereon was filed in the District Court on March 5, 1943 (R. 25-29). The court set forth its reasoning in connection with the cause presented, and at the end

[1] The Emergency Price Control Act of January 30, 1942, 56 Stat. 23, was amended by the Inflation Control Act, approved October 2, 1942, 56 Stat. 765, but the Price Administrator did not issue any new regulation covering wholesale beef cuts until December 10, 1942, to become effective December 16, 1942, in which sections 1364.51 through 1364.67 were revoked (7 Fed. Reg. 10331).

thereof said: "I, therefore, rule that these defendants cannot be held to answer to this indictment, because of the revocation of Section 1364.52 of Maximum Price Regulation No. 169, upon which the counts of the indictment are based, prior to the return of the indictment by the Grand Jury"; and concluded: "The motion to quash is granted" (R. 28-29). The appellant's statement of the case on page 5 of its brief fails to note this pertinent entry "motion to quash is granted."

In the docket of the court there appears the entry "March 5—Sweeney, J.—Opinion—Motion to quash is granted" (R. 33), and the further entry, "March 5—Sweeney, J.—Indictment quashed," which entry was subsequently attempted to be stricken by drawing a line through the same (Appendix B). The time for filing the appeal under the Criminal Appeals Act expired thirty days from March 5, 1943, the date of the decision. An attempt was made to extend the period of appeal by presenting to the court as of March 31, 1943, a written order quashing the indictment (R. 29). The customary filing stamp showing the date of filing in the clerk's office does not appear on this instrument (Appendix B).

On April 30, 1943, the Government presented an appeal to the court without notice to the appellees and had the same allowed (R. 29-33). Appellees filed a statement opposing jurisdiction on appeal and a motion to dismiss, upon the ground that the appeal was not taken within the time provided by the Criminal Appeals Act, and the further grounds that the motion to quash did not constitute a special plea in bar, and the decision and judgment was not based upon the invalidity and construction of the statute upon which the indictment was founded, but was based upon the insufficiency of the indictment.

It is claimed by the appellees that the order of March 31, 1943, as referred to on page 6 of the Appellant's Brief, was

not necessary, but was superfluous and a ruse on behalf of the Government to extend the appeal period. It was contrary to the practice of the District Court, namely: "The practice in this District, on the receipt of an opinion granting a motion to quash, is to make an entry on the docket under the judge's name, 'Indictment quashed'. It is not the practice to have a written order" (Appendix B, Appellant's Brief, p. 42).

The one issue which the court stated in its opinion constitutes sufficient grounds for quashing the indictment was raised by paragraph 25 of the appellees' motion to quash, to wit:

> "That at the time the indictment was returned, Sections 1364.51 and 1364.52 were not in force and effect, the same having been revoked or repealed by the Price Administrator on or about December 11, 1942, said revocation or repeal becoming effective December 16, 1942, which was prior to the date of the return of the indictment . . ."

As stated by Judge Sweeney, "On December 10, 1942, the revised Maximum Price Regulation No. 169 was issued to be effective December 16, 1942. While this purported to be an amendment to the original regulation, it provided that 'Sections 1364.51 through 1364.67 are revoked.' All counts of the indictment are based on Section 1364.52. The indictment was returned to the district court on December 21, 1942."

Statutes Involved.

Section 13 of the Revised Statutes, 1 U.S.C. sec. 29, and parts of the Criminal Appeals Act and the Emergency Price Control Act of 1942, are set out in the Appendix to

the Appellant's Brief, pp. 35-43. Pertinent parts of section 2 (c) and (g) of the Emergency Price Control Act and of the Inflation Control Act, omitted in the Appellant's Brief, are set forth in Appendix A herein.

Questions at Issue.

I.

Was the appeal seasonably taken and should the appeal be dismissed for want of jurisdiction?

II.

Is this an appeal from a decision or judgment quashing the indictment based upon the invalidity or construction of a statute upon which the indictment was founded or is this an appeal from a special plea in bar?

III.

Did the repeal of the regulation before an indictment bar prosecution by violation of the repealed regulation?

IV.

Was the decision of the court quashing the indictment sound in law?

Arguments, Points and Authorities.

I.

THE APPEAL WAS NOT SEASONABLY TAKEN AND SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

The opinion of Judge Sweeney dated March 5, 1943, concluded with the ruling of the court and the final decision or judgment thereon to the effect that "The motion to quash is granted" (R. 29).

This was all that was necessary to a final determination of the case and constituted the final judgment of that court. This is the accepted practice of the District Court for the District of Massachusetts in criminal cases wherein a demurrer or motion to quash has been filed.

The mere fact that the instrument was entitled "opinion" is not in and of itself conclusive. Both the opinion and the final order or decision may be combined in one instrument.

1 Freeman, Judgments (5th ed.) sec. 3.

They were so combined in this case (R. 25-29).

A motion to quash is based upon matters suggested by the record.

United States v. *Lehigh Valley R.R. Co.*, 45 F. (2d) 135.

An indictment may be quashed for any reason which would render ineffective a trial heard upon the accusation as formulated.

United States v. *Frankfeld*, 38 F. Supp. 1018.

The nature of motions to quash in the District of Massachusetts has been stated by Putnam, Circuit Judge, in *United States* v. *Grunberg et al.*, 131 Fed. 138, as follows:

> "On motions to quash, the Court accepts only such propositions as raise clear points of law. Any involved question should be raised by demurrer or motion in arrest of judgment where the Court must meet the issues and dispose of them holding them under consideration, if necessary, for that purpose; *but a motion to quash* being addressed to the discretion of the Court, and interposing avoidable delays unless

clearly justified, *should be decided on the spot and therefore our practice as to such motions is as stated.*" (Emphasis supplied.)

No written opinion or decision was necessary to decide the motion to quash. The court might, as is done in most cases, render an oral decision. If a motion to quash is granted in the District of Massachusetts, a mere statement by the court to this effect constitutes all that is necessary to end the case, and if the motion is denied, the defendant could immediately be ordered to trial. This is the customary procedure (Appellant's Brief, p. 42).

There is no rule of the District Court requiring a formal or additional order to be made, and in the absence of such a rule the established practice of the court below has the force and effect of a rule of court and is decisive in this court.

Fullerton v. *U. S. Bank*, 1 Pet. 604, 612.
Duncan v. *United States*, 7 Pet. 435, 451.
The Semaramis, 50 F. (2d) 623.

After the court had rendered its ruling and decision to the effect that the motion to quash was granted, it then became the duty of the clerk of the court to make the entry on the record.

Hoover v. *Lester*, 16 Cal. App. 151, 116 Pac. 382.
Security Trust & Savings Bank v. *Reser*, 58 Mont. 501, 193 Pac. 532.

In making the entry on the record, the clerk acts ministerially.

Takekawa v. *Hole*, 170 Cal. 323, 149 Pac. 593.
See 14 California Jurisprudence, 917.

A final judgment is one which terminates the litigation between the parties and leaves nothing to be done except the ministerial act of execution.

If a competent tribunal shows in intelligible language the relief granted as intending to be a determination of the rights of parties to an action, its claim to confidence will not be lessened by want of technical form nor by the absence of language commonly deemed especially appropriate to formal judicial records.

Ex Parte Lamar, 274 Fed. 160, 173.
Church v. Crossman, 41 Iowa, 373.

A recital of the date of judgment on the clerk's records is presumptively correct, notwithstanding that it was not entered until a later date.

Israel v. Bryan, 52 Cal. App. 66, 197 Pac. 121.

This principle has application with reference to the entry of March 5, showing that the judgment of the court was final on that date although a line was drawn through the entry after the expiration of the term of court (Appendix B).

The requisite authority or direction will be presumed where the record shows a judgment apparently regularly entered.

American Mortgage Co. v. Hill, 92 Ga. 297, 18 S.E. 425.
Ward v. White, 66 Ill. App. 155.
Wash. Nat. Bank v. Williams, 190 Mass. 497, 77 N.E. 383.
Burke v. Kaltenbach, 125 App. Div. 261, 109 N.Y. Supp. 225.

Even though, as urged in the Appellant's Brief (pp. 42, 43), a clerk failed to enter a judgment within the time required, performance is still due from him, and he should proceed with it and, when entered, it is as valid as if entered upon the date of the judgment.

Phillips v. *United States*, 264 Fed. 657, cert. den. 253 U.S. 491.

Bundy v. *Magruess*, 76 Cal. 532, 18 Pac. 668.

Irrespective of the exact date of entry by the clerk, the decision and judgment, entered as a matter of course in accordance with the practice of the District Court, was dated, and properly so, March 5, 1943 (Appendix B), and that is the date from which the period for appeal began to toll.

If the court intended to vacate the decision and judgment of March 5, 1943, by the subsequent order of March 31, it could have so stated in the usual formal language, *i.e.*, "The order entered in this case as of March 5, 1943, is hereby vacated."

Gould v. *Duluth & Dak. El. Co.*, 3 N.D. 96, 54 N.W. 316.

No intendment of a vacation or inference of a vacation could be drawn by the act of making an additional subsequent or surplus "order" at the request of counsel for the appellant.

Judge Sweeney has informed counsel that counsel for the appellant came to his office and pointed out that in *United States* v. *Swift*, 318 U.S. 442, Mr. Justice Jackson in a concurring opinion said:

". . . we would be greatly aided if the District Courts in dismissing an indictment would indicate in

the order the ground, and if more than one, would separately state and number them."

This statement could not have been a ruling of law. It was but a suggestion of improvement in Federal procedure in respect to criminal appeals.

This was the reason suggested to Judge Sweeney by counsel for the appellant for the making of the formal "order," and, without notice to the appellees, and after the entry by the clerk of the final decision of March 5 (shown to be stricken out in Appendix B), the "order" as of March 31 was drawn by appellant's counsel and signed by the court.

Judge Sweeney also informed counsel, as confirmed by letter from the clerk (Appendix C), that he told appellant's counsel at the time of signing the order dated March 31 that he did not mean or intend to grant the appellants an extension of time within which to file an appeal, had no power to do so, and only signed the order at the request of the appellants for the reason suggested by Justice Jackson in *United States v. Swift, supra.*

No such difficulty as appeared in the *Swift* case could arise in the instant case, as there was no doubt as to what the court based its decision upon, to wit:

> "The repeal of the regulation upon which the indictment was based" (R. 27-28).

There is no question but that the District Court would have no right to extend the time within which an appeal might be taken. It must be taken within thirty days, as provided under the Criminal Appeals Act.

The effect of the order of March 31, as treated by the appellant, is to make it appear that the District Court, by indirection, had extended the time within which to claim,

the appeal from March 5, 1943, the date of the decision or judgment, to March 31, 1943. It was obviously a bit of legal legerdemain to present and secure an order the effect of which would be to extend the statutory limit for appeal. If a *nunc pro tunc* order could be made as of the 31st day of March, 1943, to extend time to the 30th of April, 1943, or the 1st of May, suppose the Government had failed to take an appeal: Why could not an order now be made six months after the decision and the Government be permitted to go up on what is called a final order and thus nullify the statute?

To permit the entering of an order after a case has been decided and judgment given, which order has the effect of extending the time from which an appeal would begin to toll, if allowed, would bring this case within *Credit Co.* v. *Arkansas Central Railroad*, 128 U.S. 258, where this court said, at page 261:

> "The attempt made in this case to anticipate the actual time of presenting and filing the appeal by entering an order nunc pro tunc, does not help the case. When the time for taking an appeal has expired it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

All of the cases cited in the Appellant's Brief (pp. 12, 13) cover demurrers, with one exception, *United States* v. *Lanza*, 260 U.S. 377, in which there was filed a plea in bar of *autrefois convict*. None of the cases came from courts where the practice of the court is not to enter a formal order, and the formal orders in those cases differed from those set out in the opinion to such an extent as to leave no doubt that the formal order was necessary to the finality

of the case in that particular court. This distinction was specifically pointed out by this court in *United States* v. *Mid State Horticultural Co.*, 306 U.S. 161.

In the *Mid State* case (footnote 2, p. 163), this court states:

> ". . . The court below wrote an opinion in which it stated 'the demurrers are sustained,' and filed the opinion June 16, 1938. *But in accordance with the court's practice*, final order was not entered until July 2, 1938. In that order the court sustained the demurrers and *ordered the defendant* discharged. The Government petitioned for appeal July 20, 1938, . . ." (Emphasis supplied.)

In the instant case there was a motion to quash, which differs from a demurrer in that the motion to quash is addressed to the discretion of the court and does not admit the facts set out in the indictment.

Durland v. *United States*, 161 U.S. 306.

A demurrer is a method by which a defendant may object to an indictment as insufficient in point of law and assumes all facts to be true.

United States v. *Boutin*, 251 Fed. 313.

In the *Mid State* case the final order was entered in accordance with the usual practice of the court. In the instant case there is no practice of the District Court for the District of Massachusetts requiring a final order or an additional order to a motion to quash. The practice is to make no additional order (Appellant's Brief, p. 42).

In the *Mid State* case the court made a final order that the defendants be discharged. There was no such order in

the instant case and none was necessary. In the instant case the final order was made on March 5, 1943, and as late as April 24, 1943, the last entry in the Docket was "March 5, 1943, Sweeney, J Indictment Quashed."

As supported by affidavit of counsel in Appendix D, that entry was stricken out as shown in Appendix B, without notice of any kind being given to counsel for appellees of the additional order dated March 31, 1943.

No case has been cited by the appellant where, as in the instant case and set out in Appellant's Brief (Appendix B, p. 42):

> "The practice in this District, on the receipt of an opinion granting a motion to quash, is to make an entry on the docket under the judge's name, 'Indictment quashed'. It is not the practice to have a written order."

In the instant case the order of March 31, in addition to being contrary to the practice of the court, said nothing more than was contained in the order of March 5, to wit: "The indictment is quashed." It stands on the same footing as *Sosa et al. v. Royal Bank of Canada*, 134 F. (2d) 944 (C.C.A. 1), where the court said:

> "This second judgment from which the present appeal was taken, was merely a reiteration of the order of March 9, 1942, dismissing the complaint. . . . The appeal is dismissed for lack of jurisdiction."

Although the clerk of court is competent to certify as to the practice of the court as set out in the Appellant's Brief (Appendix B, p. 42), the one authority concerning what the judge intended at the time of signing the repetitious order of March 31 is the judge himself, and Judge Sweeney has stated to counsel that his intention was as is here out-

lined, and he expressly told the appellant's counsel that the order would not extend the time for appeal from the date of decision and judgment of March 5, 1943, as is borne out by Appendix C.

The appellant was not entirely disingenuous in this statement:

> ". . . As will be there seen, the U. S. Attorney applied for the formal order because of prejudicial delay in making an entry in the Court's records to the effect that the indictment was quashed" (Appellant's Brief, p. 17).

The District Attorney is supposed to follow the progress of a case, to keep a record by day and date of all indictments, motions, proceedings, decisions, trials, findings and sentence thereon. He knew, when the case was decided on March 5, 1943, of the court's action and the suggestion in the opinion that the United States has a right of appeal (R. 28).

It is highly prejudicial to the interest of the defendant in a criminal case for counsel for the United States, without notice to the defendant, to have an order issued for the purpose of explaining the basis of the court's decision, in a district where the practice is not to enter a formal order, and then employ the order so obtained to extend the time within which an appeal can be taken.

II.

This Case is One in which No Direct Appeal to This Court Lies under the Criminal Appeals Act.

A motion to quash is not a "plea in bar," within the meaning of the Criminal Appeals Act, entitling the United States to take a direct appeal therefrom.

The decision or order appealed from was not based upon the construction or invalidity of the statute upon which the indictment was founded, as required by the Criminal Appeals Act, and therefore no appeal lies to this court.

United States v. *Hastings*, 296 U.S. 188.
United States v. *Halsey Stuart Co.*, 296 U.S. 451.
United States v. *Swift & Co.*, 318 U.S. 442.
United States v. *Borden Co.*, 308 U.S. 188.

The construction of the Emergency Price Control Act as it is necessary to construe the Act itself was in favor of the contention of the Government, the appellant, in that the Act was not unconstitutional The decision of the court as to the survival of the regulations after their repeal for the purpose of prosecuting offenses in violation thereof was based upon general principles of law which had nothing to do with the construction of the Emergency Price Control Act itself. And, in addition thereto, R.S. sec. 13, 1 U.S.C. sec. 29, was analyzed by the court and the inapplicability of that particular statute discussed at length, but that statute is not one upon which this indictment was founded.

United States v. *Borden Co.*, 308 U.S. 188, would seem to have no application to the case at bar, since there was a conspiracy to violate the Sherman Act itself, and the court sustained a demurrer upon the ground that the indictment did not charge an offense under the Sherman Act. There was no way that the court could escape construing the applicability of the Sherman Act; whereas in the case at bar the judge rests on a mere deficiency of the indictment as a pleading, as distinguished from the construction of the statute which underlies the indictment.

It will be noted here that an appeal will not lie where the decision of the court is based partly upon the construction of the statute and partly upon the insufficiency of the indictment.

In *United States* v. *Borden*, *supra*, this court said, at page 493:

> "Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination."

It was not necessary for the trial court to construe the penalties imposed by the Emergency Price Control Act in reaching the conclusion that the revocation of the regulations upon which the indictment was based left no issue upon which a trial could be held on the indictment. The judge's decision was based, at least in part, upon the insufficiency of the indictment.

The granting of the motion to quash the indictment was based, not upon the interpretation of the Emergency Price Control Act itself, but upon the interpretation, upon general principles of law, of the effect of the repeal by the Price Administrator of the regulation which he promulgated (R. 25-29). It was based upon the insufficiency of the indictment as returned.

III.

The Action of the District Court in Quashing the Indictment in This Case was Proper.

When the regulations upon which the indictment was based were repealed, the Grand Jury was without power to indict these defendants upon the repealed regulations, and the court was without jurisdiction or power to try the

defendants, and hence the motion to quash was properly allowed. Judge Sweeney has stated the principle of law relied upon in his opinion (R. 27):

> "The common law rule was that under the repeal of an Act without any reservation of its penalties, all criminal proceedings taken under it fell."

Numerous cases are cited by the court in support of that proposition. One of them is *United States* v. *Reisinger*, 128 U.S. 398.

In *Yeaton* v. *United States*, 5 Cranch, 281, 283, 3 Law. Ed. 101, 102, Chief Justice Marshall said:

> "It has been long settled upon general principles, that after the expiration or a repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by Statute."

Chief Justice Taney observed in *State of Maryland for Use of Washington County* v. *B. & O. R.R. Co.*, 3 How. 534, 552, 11 Law. Ed. 714, 722:

> "The repeal of the law imposing the penalty is of itself a remission."

In *United States* v. *Tynen*, 11 Wall. 88, 95, 20 Law. Ed. 153, 155, this court stated the principles applicable to criminal proceedings:

> "There can be no legal conviction nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal, the legislative will is expressed that no further proceedings be heard under the Act repealed."

It is clear that the language of the general saving provision in relation to the repeal of statutes was not intended to extend to anything but a statute.

United States v. *Chambers*, 291 U.S. 221, 224.

In the instant case it was not the repeal of a statute, by Congress, which wiped out the offense, but the revoking of the regulation by the authority who alone was given power to issue the regulation and who revoked it for reasons not apparent on the record but within his power to so do, the effect of which was to leave persons affected in a position they would have been in if the regulation had never been issued.

The decision of the trial court granting the motion to quash held that R.S. sec. 13, 1 U.S.C. sec. 29, had no application to a regulation. The appellees contend that the court was correct in this finding and argue that the Act of Congress was intended to take care of such statutes as might be created by Congress and did not apply to regulations or orders issued by an administrative officer. The power to establish a regulation as Price Administrator carries with it the power to revoke, modify or amend.

It is clear that Congress did not intend that R.S. sec. 13, should apply to regulations issued by the Price Administrator. Where Congress has specifically declared that such saving provisions as would apply to regulations issued by the Price Administrator are those set out in the Emergency Price Control Act itself, under the rule of construction, this is an exception which is urged in support of appellee's position.

If the authority revoking the regulation had desired or intended to have the provisions of the regulation still apply to pending cases or violations during its existence, he should have inserted a saving clause; revocation of the

regulation leaves it in the same position as if it had never been issued.

As pointed out by the court (R. 27)—

> "The Emergency Price Control Act of 1942, is not self-operative, and the type of crime which is charged in this indictment could not come into existence until regulations had been promulgated by the Administrator under legislative authority delegated to him by Congress."

The defendants-appellees are not subject to punishment under the Act, standing alone, without violation of some regulation made thereunder.

Under title II of the Act, sec. 201 (d)—

> "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

As far as the penal provisions of the Act are concerned, the Administrator therefore makes or unmakes the law. A repeal of a penal Act by the legislature has been deemed to be a general pardon.

A mere glance at the Act will show the enormous delegation of powers by the legislature to the Office of Price Administration.

Title I, sec. 1 (a), is set out in Appellant's Brief, p. 36, and shows the general purposes of the Act.

Section 2 (a) provides:

> "Whenever in the judgment of the Price Administrator [provided for in section 201] the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with

the purposes of this Act, *he may by regulation or order establish such maximum prices*, as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. . . ." (Emphasis supplied.)

The Price Administrator, on April 28, 1942, issued General Maximum Price Regulation, which became effective May 11, 1942.[2] It established the maximum price to be the same as the maximum charged during March, 1942, for a similar commodity. If no similar commodity was handled by the seller during March, 1942, he was to take the highest price of his most closely competitive seller of the same class for that commodity.

General Maximum Price Regulation continued in force until July 20, 1942, the effective date of Maximum Price Regulation No. 169.[3] Regulation No. 169 sought to establish maximum prices for beef and veal carcasses and wholesale cuts, inaugurated a system of grading upon which prices were predicated and provided under section 1364.52:

> "The Maximum Price for each grade of each beef and veal carcass shall be the highest price actually charged by the seller during the period of March 16 to March 28, 1942, at or above which at least 30% of the total weight volume of the seller's sales of car-

[2] 7 Fed. Reg. 3153; and in the Statement of Considerations accompanying the same the Price Administrator said: "In large-scale affairs of practical importance, it is necessary to make a beginning. So long as the broad outlines of the general regulation are fair, particular difficulties may be handled upon subsequent prompt consideration. No other course is possible or practicable. This is particularly true in the domain of price regulation where so much depends upon prediction and a sense of judgment, and where so much must inevitably be a matter of trial and error and adjustment, with expectations tested in actual experience."

[3] 7 Fed. Reg. 4653.

> carcasses and wholesale cuts of the same grade were made during such period";

and further provided that, in the event that no sales were made during the base period, thereby preventing the seller from establishing maximum prices for such graded carcasses or cuts, the seller's maximum therefor shall be the maximum price of the most nearly competitive seller.

On or about September 17, 1942, an amendment to Regulation No. 169[1] was issued requiring a sex designation in addition to grading the beef with a definite maximum price per pound at which the various grades and sexes could be sold, but this regulation did not amend the maximum prices of wholesale cuts other than carcasses and specified that—

> "In any case where the maximum price of any beef wholesale cut was obtained from a most nearly competitive seller, such price shall be revised to conform with the adjusted maximum price of the competitive seller, if the price has been affected by this paragraph."

The Emergency Price Control Act purported to authorize the Price Administrator to establish the maximum prices at which commodities could be sold. Maximum Price Regulation No. 169, sec. 1364.52 (now revoked, and no longer effective), issued by the Price Administrator, merely sets forth a formula by which any person selling or delivering beef and veal carcasses and wholesale cuts may establish their maximum price at which that commodity may be sold by them.

The revoked section 1364.52 of Regulation No. 169 left it to the individual to establish the price. It merely set

[1] 7 Fed. Reg. 7314.

forth the method to be employed in arriving at such maximum.

On October 2, 1942, the Emergency Price Control Act was amended by the Inflation Control Act (56 Stat. 765). Section 3 of the Amendment provided:

> "... That in the fixing of maximum prices on products resulting from the processing of agricultural commodities including livestock, a generally fair and equitable margin shall be allowed for such processing."

Notwithstanding this Amendment, no change in maximum prices was made until December 10, 1942, when the Administrator issued Revised Maximum Price Regulation No. 169,[5] which provided: "Sections 1364.52 through 1364.67 are revoked."

The Administrator, having the right to create a regulation, could destroy it just as readily. As indicated in his Statement of Considerations accompanying General Maximum Price Regulation, *supra*, his regulation was "a matter of trial, error and adjustment." Under these circumstances, by repealing, recalling or revoking a regulation, it is an admission that the regulation is not quite what the Administrator wants and that there should be a different regulation. It is just as ineffective as though it had never been set into operation.

Suppose, as contended by the appellees in this Brief and in their motions to quash (R. 12-17), the issuance of Maximum Price Regulation No. 169 by the Administrator was not legal and within the authority vested in him by the Emergency Price Control Act. Assume, further, that the Price Administrator recognized this when brought to his attention and sought to correct his regulation to conform

---

[5] 7 Fed. Reg. 10381.

to the law and be within his delegated authority. He would have the right to recall the illegal regulation and supersede it with one of legal composition. If he intended to change or alter the sections of Regulation No. 169 relating to Maximum Prices, he could have done so by a simple amendment, but he chose to "revoke" rather than "amend." When he withdrew rather than cut short the regulation, it ceased to exist just as effectively as though it had never been issued.

The appellant contends that *Curtis-Wright Exporting Co.* v. *United States*, 299 U.S. 304, is controlling. Appellees say it is distinguishable in many ways and is not applicable.

In the first place, the decision did not turn upon the delegation of power under Article I of the Constitution, but mainly upon the power that the President had by virtue of his office to deal with international matters outside the country. That power, buttressed by the Joint Resolution, seemed to be the principle thing which controlled the court in its decision. The court had said upon page 315:

> "Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States and falling within the category of foreign affairs."

Again, on page 319-320, the court said:

> "It is important to bear in mind that we are here dealing not alone with the authority vested in the President by an exertion of legislative power but as such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of

> the Federal Government in the field of international relations . . . congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible where domestic affairs alone be involved."

In the instant case there could be no question of discretionary power of the President under section 2 of article II of the Constitution, the section dealing with the President's treaty-making powers.

The resolution of Congress giving the President authority to forbid the sale in this country of munitions to countries at war in the Chaco, page 312 of the Opinion, recites:

> "That it shall be unlawful to sell except under such limitations and exceptions as the President prescribes any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict or to any person, company, or association acting in the interest of either country until otherwise ordered by the President or by Congress."

Crimes committed during the life of the first proclamation could not be wiped out by the second proclamation but must continue until the statute of limitations has run against them. These crimes were of a serious character affecting the foreign relations of the United States and might involve conceivably the United States with foreign countries. It was not necessary that the President's second proclamation revoking the original proclamation should have a saving clause for the purpose of maintaining any proper action or prosecution for the enforcement of

such penalty, forfeiture or liability. The fact is that this Court has said so very plainly and has ignored the general saving clause in R.S. sec. 13, 1 U.S.C. sec. 29. But here again we must keep in mind that the delegations of power under the Emergency Price Control Act is limited by the principles laid down by this court in a long line of decisions. The power to conduct and regulate our foreign relations is a different thing and is plenary. Moreover, under the Emergency Price Control Act, the Price Administrator may change a rule or regulation fixing maximum prices at any time. It may be one thing today and another thing tomorrow; or one thing this month and another thing next month or the next year. To make the violation of every dead regulation a criminal offense is quite a different thing from punishing for the sale of fire arms to foreign countries endangering diplomatic relations of the United States with those countries.

The repeal of the first proclamation in the *Curtis-Wright* case did not substitute another proclamation creating other and additional crimes and offenses. In the case at bar the regulation under which the indictment had been drawn had been repealed and another regulation established in its stead. The Price Administrator had the power, so far as the making of the regulation is concerned, to make and unmake the law. The law without the regulation was a dead letter and ineffective.

This court has said in the *Curtis-Wright* case that it would have made some difference in the decision if the Joint Resolution had expired. We assume that the same proposition would have been true if there had been a repeal of the Joint Resolution. In that case offenses committed during the life of the proclamation would have died with the repeal. In the instant case the regulation upon which the indictment was based, Regulation No. 169, was repealed December 10, 1942, to become effective December

16, 1942. On October 2, 1942, the Price Control Act, while not repealed, was modified by the Inflation Control Act (56 Stat. 765), which provided a different standard in fixing the meat regulation, to wit:

> "That in the fixing of maximum prices on products resulting from the processing of agricultural commodities including livestock, a generally fair and equitable margin shall be allowed for such processing."

That Act would appear to be the reason for the repeal of the original Regulation No. 169. If that is so, can the regulation still have vitality upon which to base the prosecution?

Appellant's Brief, beginning on page 30 and ending on page 31, says:

> "It would follow that every substantial revision of a Regulation would constitute a revocation."

This is just what it is and nothing more, when the regulation says it is revoked.

And continues:

> "Since the rule applies not only to prosecutions begun after repeal but also to those pending in a trial or appellate court at the time of repeal, violators of a maximum price regulation could, if revocation terminates the power to prosecute, escape punishment by the simple expedient of keeping the Court proceedings alive until the violated regulation has been superseded."

That is an entirely new theory of the criminal law. Violators never had such power and never will have such power. Criminal proceedings once properly begun and

the court having jurisdiction will continue to final judgment in a court of appeal, if the case gets to a court of appeal.

Section 1 (b) of the Price Control Act provides that the Act shall terminate on June 30, 1943 [8]—

> "or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution between the two Houses of the Congress, declaring that the future continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability or offense."

Judge Sweeney points out in his opinion (R. 28):

> "But again this Saving Clause applies to the termination or repeal of the Act in any other manner specified. It has no application to the revocation of sections of a Regulation."

The appellants in their Brief (p. 31) contend:

> "The fact that Congress took pains to assure that the repeal or expiration of the entire statute should not terminate prosecutions for prior violations of the Regulation is a clear indication that *a fortiori* that

[8] On October 2, 1942, this was amended to June 30, 1944. Title 50 U.S.C. App. sec. 967.

> Congress did not intend the mere revocation of such Regulation during the life of the statute to destroy the power to penalize prior unlawful violations."

The intention of Congress is to be gathered from what Congress said in the words and the language used. To infer more than was said or stated in the saving clause is hardly permissible under any theory of statutory construction.

While the Act was outstanding and alive, the Price Administrator was the one who had the control of regulations, and having revoked a regulation without reservation, he was exercising his authority.

Section 2 (a) (50 U.S.C. App. sec. 902 G) of the Emergency Price Control Act provides that—

> "Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

Judge Sweeney in his opinion said (R. 28):

> "It would seem that Congress has empowered the Administrator to insert a Saving Clause in any amended Regulation under this Section in this provision."

Judge Sweeney also said:

> "And if not contained in this section, I think the authority might be implied generally but if there is no power in the Administrator to add a Saving Clause in his Regulation, then the power rests completely in Congress."

Had Congress intended to extend the saving clause to prosecutions for violation of regulations repealed, it could have said so, and, not having said so, a strong presumption arises that Congress did not intend to continue prosecution of violations of regulations repealed. Suppose the regulations had been changed a dozen times: It would be highly impracticable to prosecute for violation of the whole series of regulations. If a repeal of the regulation does not repeal the law, it operates certainly to repeal the thing that gives the law life and vitality. Repeal all the regulations for the control of price or prices and the law would be nugatory and ineffective.

Summary.

I.

It is contended that the appeal was not seasonably taken and that the motion to dismiss should be granted. The Act says that the appeal must be taken within thirty days, and thirty days means thirty days. The court did not have the power to directly extend the period within which an appeal must be taken, and therefore the court did not have the power to do it indirectly; but in this case the court never intended to extend the time for filing the appeal.

II.

It is contended that the decision or judgment was not based upon the construction or validity of the Emergency Price Control Act, the statute upon which the indictment was based. There is nothing of real substance in the contention of the appellant that the Act was construed because of the application of certain general principles of law with reference to repeal of statutes or revocation of regulations.

III.

It is contended that the decision of the District Court was based in part at least upon an insufficiency of the indictment.

IV.

It is contended, finally, that at the time this indictment was brought, the regulations upon which it was based having been revoked, no prosecutions could be had for the violation of the same.

Conclusion.

It is respectfully submitted that the judgment of the District Court should be sustained.

LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Attorneys for Appellees.

Appendix A.

The Constitution of the United States, article I, provides in part as follows:

> "Section 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives."

Article II of the Constitution of the United States provides in part as follows:

> "Section 2. . . . "He [the President] shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments."

The Act of January 30, 1942, 56 Stat. 23, 50 U.S.C. App. Supp. II, sec. 901 *et seq.*, called the Emergency Price Control Act of 1942, provides in part as follows:

> Section 2. (c) "Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator

are necessary or proper in order to effectuate the purposes of this Act . . ."

(g) "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

The Inflation Control Act of 1942, 56 Stat. 765, title 50 U.S.C. App. sec. 961 *et seq.*, provides:

Sec. 3. "No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture . . .

"(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

"(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section; *Provided further*, That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further*, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further*, That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural

commodity, as provided for by this Act, adequate weighting shall be given to farm labor. . . ."

Appendix B.

DISTRICT COURT OF THE UNITED STATES

District of Massachusetts

No. 16021, Criminal

UNITED STATES by Indictment

v.

JACOB HARK et al

ORDER

(March 31, 1943)

SWEENEY, J. This cause came on to be heard upon the defendant's motion to quash the indictment alleging that Maximum Price Regulation No. 169 has been revoked by the Price Administrator, effective December 16, 1942, before the indictment was returned. This allegation was not denied by the Government. After hearing arguments of counsel for the defendant and of the United States Attorney, it is

Ordered that the indictment be and it hereby is quashed on the ground that the Regulation alleged to have been violated was revoked prior to the return of the indictment.

By the Court:

ARTHUR M. BROWN
Deputy Clerk

March 31, 1943
G C SWEENEY
U.S.D.J.

No. 16021, Contd.

Date	Proceedings	Clerk's Fees Plaintiff	Defendant
1943.	UNITED STATES v. JACOB HARK et al.		
Jan. 4	Pleas in abatement (2) filed by deft. Hark		
Jan. 4	Plea in abatement filed by deft. Yaffee		
Jan. 4	Motions to quash (2) filed by deft. Hark		
Jan. 4	Motion to quash filed by deft. Yaffee.		
Jan. 4	Demurrer filed by deft. Hark.		
Jan. 16	Sweeney, J. Hearing on pleas in abatement filed by deft. Hark, plea in abatement filed by deft. Yaffee, motions to quash filed by deft. Hark, motion to quash filed by deft. Yaffee, and demurrer filed by deft. Hark; taken under advisement; one week for briefs.		
March 5	Sweeney, J. - Opinion—Motion to quash is granted.		
~~March 5~~	~~Sweeney, J. Indictment quashed.~~		
March 31	Sweeney, J. Order quashing indictment.		
April 30	Petition for appeal filed by United States		
April 30	Statement as to jurisdiction filed by United States		
April 30	Assignment of errors and prayer for reversal filed by United States		
April 30	Sweeney, J. Order allowing appeal.		

April	30	Citation issued—returnable within forty days from this date.	
April	30	Praecipe filed by United States.	
June	2	Certified copy of transcript of record	25 10

DISTRICT COURT OF THE UNITED STATES

District of Massachusetts.

I, JAMES S. ALLEN, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing are true photostatic copies of the ORDER, entered March 31, 1943, and of the ENTRIES on page 2 of the Criminal Docket of said Court from January 4, 1943 to June 2, 1943, inclusive, in the cause in said District Court entitled.

No. 16021 Criminal.

THE UNITED STATES, by Indictment,

v.

JACOB HARK and HYMAN YAFFEE, Defendants,

pending in said District Court.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said Court, at Boston, in said District, this eighteenth day of September, A.D. 1943.

JAMES S. ALLEN

[SEAL]

Appendix C.

DISTRICT COURT OF THE UNITED STATES

District of Massachusetts
Office of the Clerk
1525 Federal Bldg.
Boston

October 22, 1943

John Henry Lewin, Esq.,
Acting Assistant Attorney General
Department of Justice,
Washington, D. C.

Re: United States v. Jacob Hark, et al.
File—KLK 146-18-50-4.

Dear Sir:

In connection with my letter to you of July 28th about the docket entries in this case, I desire to give some additional information. The entry of March 5, 1943,

"Sweeney, J. Opinion—Motion to quash is granted"

was made within a few days of that date. The following entry under that date,

"Sweeney, J. Indictment quashed",

was not made until some time between March 25 and March 29, although according to our practice it should have been made upon entry of the opinion. When this omission was called to the attention of our docket clerk, she made the entry under date of March 5. This entry was made between March 25th and March 29th, so that, in accordance with our established practice at that time the thirty-day appeal period would start to run not later than March 29th, for, as I told you in my previous letter, it was not the practice of this Court to require written orders.

On or about March 31st, the Government presented a written order to me, and I accompanied the United States Attorney to Judge Sweeney's chambers. It was entirely new procedure for us to have a written order. I understand it was only because the United States represented that the Department of Justice wanted a written order in this case, so as to conform to the suggestion contained in Mr. Justice Jackson's concurring opinion in *United States v. Swift & Co.*, 318 U. S. 442, 446, that Judge Sweeney signed the order. I can recall that Judge Sweeney protested against the necessity of signing such an order when it was presented to him, but did sign it at the request of the United States Attorney. I also remember that Judge Sweeney said he was not going to adopt the practice of signing orders in all such future cases. When it came time to make an entry of this order in the books, I assumed that it was to take the place of the entry "Sweeney, J. Indictment quashed", which was made between March 25th and March 29th, and I told the docket clerk making the entry to cross out the entry which had been made previously between March 25th and March 29th.

When I wrote my letter to you, it seemed to me that I had told the Court that the entry of March 5 would necessarily be stricken out, but I find that the Court has no recollection of being so informed. There was no intention that the order of March 31 should extend the time for appeal, and it is the Court's recollection that he so stated to counsel.

By direction of the Court, I am sending a copy of this letter to counsel for the defendant.

Respectfully yours,

ARTHUR M. BROWN,
Deputy Clerk.

AMB-JDF.

Appendix D.

I, Leonard Poretsky, hereby declare that on April 23, 1943, in company with Associate Counsel, John H. Backus, went to the office of the Clerk of the District Court for the District of Massachusetts at Boston and examined the docket in the case of United States v. Hark et al. #16021.

The last entry in the docket was:

"March 5, 1943, Sweeney, J. Indictment quashed."

I again went to the Clerk's Office on April 24, 1943, at 11:25 A.M. and found this entry still on the docket.

On or about April 30, 1943, I discovered that the entry of March 5, 1943, above referred to, had a typewritten line stricken through it, and another entry appeared in the docket as of March 31, 1943, which entry was made subsequent to April 24th, the date I had last seen the docket.

Although all papers filed in the Office of the Clerk are stamped with the Clerk's stamp showing the date of filing thereof, no such stamp appears to have ever been put on the March 31 order, showing the date of filing with the clerk's office.

Counsel for the Appellees were not notified or present when the order of March 31 was presented to the court.

Dated at Boston, Massachusetts, this 22nd day of October, 1943.

LEONARD PORETSKY

Then personally appeared the above-named Leonard Poretsky and subscribed to the truth of the above statements the 22nd day of October, 1943.

Before me

WILLIAM B. BAKER,
Notary Public

Boston, Massachusetts.

FILE COPY

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 83.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY, APPELLEES.

PETITION FOR REHEARING.

Come now the above-named appellees and present this, their petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully show:

1. The opinion of this Court relative to the timeliness of this appeal was based upon the action of the judge in signing a formal judgment as constituting *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry.

This *prima facie* presumption is rebutted by the letter written to the Department of Justice by the Deputy Clerk, as set out in Appendix C, pages 38-39, of the Appellees' brief. The circumstances attending the order of March 31 would have been unknown to the appellees or their counsel were it not for the direction by the Court to forward a copy of that letter to their counsel. It is obvious that this letter

was brought to the attention of Judge Sweeney and carries the weight of his approval. The only purpose which it could serve and the only inference which could be drawn from Judge Sweeney's order to furnish appellees' counsel with a copy thereof is to avoid any misapprehension arising from the state of the record and to offset any *prima facie* presumption which might arise therefrom.

In the statement "There was no intention that the order of March 31 should extend the time for appeal, and it is the Court's recollection that he so stated to counsel," and in ordering a copy of the letter sent to appellees' counsel, Judge Sweeney was, so far as he honorably could, and with an obedience to the dictates of truth, justice and fair play, indicating his purpose and intention when the order dated March 31 was signed. The object of the trial judge in ordering the letter sent to counsel was to prevent any misconstruction of the action of March 31 as it would appear on the record. It is a proper exercise of the power of the trial Court to amplify or explain its action or record of action and is, in law and fact, an order of that Court which should likewise be given careful consideration by this Court. The appellees respectfully ask this Court to review the content of the letter in Appendix C, pages 38-39, of their brief, which they believe is sufficient to rebut the effect given the *prima facie* record of March 31.

The Department of Justice must have had some doubt as to the regularity and validity of the March 31st order of Judge Sweeney, since some time before July 29th, as appears from Appendix B, page 42 of the appellant's brief, one John Henry Lewin, Acting Assistant Attorney General, wrote to Arthur M. Brown, Deputy Clerk of the District Court, with regard to the docket entry of March 5th. This letter was not available to the appellees and if produced might throw some further light upon the controversy.

In *United States* v. *Swift & Co.*, 318 U.S. 442, Mr. Justice Jackson, at page 446, said: "We would be greatly aided if the District Courts in dismissing an indictment would indicate in the order the ground, and, if more than one, would separately state and number them."

Since Judge Sweeney signed the order of March 31st, upon the Government's representation that it was intended to comply with the suggestion of Mr. Justice Jackson in the *Swift* case, its use for any other purpose constituted a fraud upon the trial Court.

2. In the five cases brought to this Court under the Criminal Appeals Act from the District Court for Massachusetts, the record of the first three cases shows that the order was made by the Clerk (just as the entry of March 5 was made by the Clerk in this case). In each instance the order was made at the same time as the opinion. The last of these cases, decided in 1931, carried no opinion. These were decisions or judgments "on the spot" following the established common-law rule for the District of Massachusetts as reaffirmed by Judge Putnam in *United States* v. *Grundberg et al.*, 131 Fed. 138.

The opinion in this case is in contradiction to the established practice for the District of Massachusetts and marks the first time that a decision or judgment on a motion to quash is rendered at a later date than the opinion therein.

It further marks the first instance where a statement by the Court "Motion to Quash is granted," followed by a subsequent entry in the docket by the Clerk "Indictment Quashed," is construed to be anything but final judgment in a criminal case in the District Court of Massachusetts.

The effect of this opinion is such that many cases in the District Court of Massachusetts, long since considered finally determined, may be made subject to appeal by asking that a formal judgment be now entered therein.

It contradicts the established practice of the District Court of Massachusetts having the force and effect of a rule of court and results in perplexity and uncertainty in determining when a case is finally disposed of in the District of Massachusetts.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration; the appeal be dismissed as being untimely, and the judgment of the District Court of Massachusetts affirmed.

Respectfully submitted,

LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Counsel for Appellees.

CERTIFICATE OF COUNSEL.

We, Leonard Poretsky, John H. Backus and William H. Lewis, counsel for the above-named Jacob Hark and Hyman Yaffee, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 83.—October Term, 1943.

The United States of America, Appellant, vs. Jacob Hark and Hyman Yaffee, Co-partners doing business as Liberty Beef Company.	Appeal from the District Court of the United States for the District of Massachusetts.

[January 3, 1944.]

Mr. Justice Roberts delivered the opinion of the Court.

This appeal, prosecuted under the Criminal Appeals Act,[1] presents questions touching the jurisdiction of this court and the merits of the controversy.

Appellees were indicted December 21, 1942, for sales of beef in violation of Maximum Price Regulation No. 169, as amended, issued pursuant to the Emergency Price Control Act of 1942.[2] They moved to quash. The District Court rendered an opinion March 5, 1943, holding that, since the pertinent provisions of the regulation which the appellees were charged to have violated had been revoked prior to the return of the indictment, they could not be held to answer the charge.[3] The last sentence of the opinion was: "The motion to quash is granted."

Under date of March 5 the clerk made an entry in the docket as follows: "Sweeney, J. Opinion—Motion to quash is granted." There seems to be no dispute that some days later an additional entry was placed upon the docket bearing the date March 5 and reading: "Sweeney, J. Indictment quashed." It further appears that, upon application of the United States Attorney, Judge Sweeney, on March 31, signed a formal order quashing the indictment.[4] On the same day the clerk struck from the docket the

[1] 18 U. S. C. § 682.

[2] 56 Stat. 23, 50 U. S. C. § 901, etc.

[3] 49 F. Supp. 95.

[4] "Sweeney, J.: This cause came on to be heard upon the defendant's motion to quash the indictment alleging that Maximum Price Regulation No.

last mentioned entry dated March 5 and entered, under the date March 31, the following: "Sweeney, J. Order quashing indictment." On April 30 Judge Sweeney allowed a petition for appeal to this court.

The appellees moved to dismiss the appeal on the grounds that it was not seasonably taken for the reason that the decision upon the motion to quash made by Judge Sweeney in his opinion of March 5 constituted the judgment of the court; and that, as the appeal is not based upon the invalidity or construction of the statute upon which the indictment was founded, it was improperly taken to this court under the Criminal Appeals Act. We postponed consideration of the motion to the hearing on the merits.

First. The Criminal Appeals Act requires that any appeal to this court which it authorizes be taken "within thirty days after the decision or judgment[5] has been rendered" . . . Neither the District Court nor this court has power to extend the period. If the opinion filed on March 5 constituted, within the meaning of the Act, the decision or judgment of the District Court, or if either of the docket entries bearing date March 5 constituted the final decision or judgment, the appeal was untimely.[6] The circumstances disclosed require that we determine what constitutes the decision or judgment from which an appeal lies in this case. We are without the benefit of a rule such as Rule 58 of the Federal Rules of Civil Procedure which provides that "the notation of a judgment in the civil docket as provided by Rule 79(a) con-

169 has been revoked by the Price Administrator, effective December 16, 1942, before the indictment was returned. This allegation was not denied by the Government. After hearing arguments of counsel for the defendant and of the United States Attorney, it is

Ordered that the indictment be and it hereby is quashed on the ground that the Regulation alleged to have been violated was revoked prior to the return of the indictment.

By the Court:

ARTHUR M. BROWN,
Deputy Clerk.

March 31, 1943.
GEORGE C. SWEENEY,
U. S. D. J."

[5] The words "decision" and "judgment" as used in the Act are not intended to describe two judicial acts, but a single act described in alternative phrases. Cf. Ex parte Tiffany, 252 U. S. 32, 36.

[6] There is no dispute that the entry of March 5, "Indictment quashed", was in fact not placed upon the docket for a number of days after March 5, but it was made before March 29. Even if the actual date when it was placed on the docket is to control, an appeal taken April 30 would be out of time.

stitutes the entry of the judgment; and the judgment is not effective before such entry."

The judgment of a court is the judicial determination or sentence of the court upon a matter within its jurisdiction. No form of words and no peculiar formal act is necessary to evince its rendition or to mature the right of appeal. And the modes of evidencing the character of the judgment and of attesting the fact and time of its rendition vary from state to state according to local statute or custom, from a simple docket entry or the statement of a conclusion in an opinion, to a formal adjudication, signed by the judge or the clerk, in a journal or order book, or filed as part of the record in the case. The practice in federal courts doubtless varies because of the natural tendency to follow local state practice. Unaided by statute or rule of court we must decide on the bare record before us what constitutes the decision or judgment of the court below from which appeal must be taken within thirty days after rendition.

In view of the diverse practice and custom in District Courts we cannot lay down any hard and fast rule. Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry.[7] In recent cases we have so treated it.[8] But we are told by appellees that it is not the practice of the court below to require written orders, and that entry on the docket has always been considered as entry of judgment, and for this support is found in a letter from a deputy clerk of the court. On the other hand, the appellant calls our attention to five cases brought here under the Criminal Appeals Act from the District Court for Massachusetts in each of which the record contains a formal order quashing an indictment, and in four of which there was an opinion as well as the formal order.[9] In view of these facts, we think we should give weight to the action of the judge rather than to the opinion of counsel or of a ministerial officer of the court. The

[7] In the federal courts an opinion is not a part of the record proper, England *v.* Gebhardt, 112 U. S. 502, 506; and in some jurisdictions the docket entries are not.

[8] United States *v.* Resnick, 299 U. S. 207; United States *v.* Midstate Horticultural Company, 306 U. S. 161. Compare United States *v.* Swift & Co., 318 U. S. 442, 446.

[9] United States *v.* Stevenson, 215 U. S. 190; United States *v.* Winslow, 227 U. S. 202; United States *v.* Foster, 233 U. S. 515; United States *v.* Farrar, 281 U. S. 624; United States *v.* Scharton, 285 U. S. 518.

judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran.

Second. This appeal is authorized by the Criminal Appeals Act. That Act permits a direct appeal to this court, *inter alia*, from a judgment of a district court "sustaining a special plea in bar". The material question is not how the defendant's pleading is styled but the effect of the ruling sought to be reviewed,[10] and we have, therefore, treated a motion to quash, the grant of which would bar prosecution for the offense charged, as a plea in bar within the purview of the statute.[11] The defense here was in bar of the prosecution; to sustain it was to end the cause and exculpate the defendants.

Third. We hold that revocation of the regulation did not prevent indictment and conviction for violation of its provisions at a time when it remained in force. The reason for the common law rule that the repeal of a statute ends the power to prosecute for prior violations[12] is absent in the case of a prosecution for violation of a regulation issued pursuant to an existing statute which expresses a continuing policy, to enforce which the regulation was authorized. Revocation of the regulation does not repeal the statute; and though the regulation calls the statutory penalties into play, the statute, not the regulation, creates the offense and imposes punishment for its violation.[13] *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, is authority for the view that an indictable offense was charged.

The judgment is reversed.

---

[10] United States v. Thompson, 251 U. S. 407, 412; United States v. Barber, 219 U. S. 72, 78.

[11] United States v. Oppenheimer, 242 U. S. 85, 86.

[12] United States v. Tynen, 11 Wall. 88, 95; cf. United States v. Chambers, 291 U. S. 217 at 226.

[13] Cf. United States v. Grimaud, 220 U. S. 506, 522.

SUPREME COURT OF THE UNITED STATES

No. 83.—October Term, 1943.

The United States of America, Appellant, vs. Jacob Hark and Hyman Yaffee, Co-partners doing business as Liberty Beef Company.	Appeal from the District Court of the United States for the District of Massachusetts.

[January 3, 1944.]

Mr. Justice Murphy, dissenting.

I cannot agree that this appeal was "taken within thirty days after the decision or judgment has been rendered," as required by the Criminal Appeals Act, 18 U. S. C. § 682. This appeal was allowed by Judge Sweeney of the District Court of Massachusetts on April 30, 1943, and is timely only if the formal order signed on March 31 constitutes the final decision or judgment. The particular circumstances of this case, however, forbid such a conclusion.

As the majority opinion states, the final decision or judgment from which the thirty-day appeal period runs requires no peculiar formal act or form of words. The effective act varies from court to court. But there is no doubt as to the practice in the District Court of Massachusetts. As stated by the deputy clerk of that court, whose duties and familiarity with the court's procedure lend great weight to his statements, "The practice in this District, on the receipt of an opinion granting a motion to quash, is to make an entry on the docket under the judge's name, 'Indictment quashed.' It is not the practice to have a written order." This statement, which appears to have had the approval of Judge Sweeney, clearly indicates that the final judgment in this case is to be found in the docket entry under the judge's name.

Judge Sweeney's opinion of March 5 granted the motion to quash the indictment. Pursuant to the District Court's practice, an entry on the docket under the judge's name, constituting the final judgment, would normally have been made on the same day,

March 5. Because of inadvertence, however, the entry was not made until some time between March 25 and March 29. At that time the docket clerk made the following entry on the docket: "March 5. Sweeney, J. Indictment quashed." That entry thereby constituted the final and effective judgment. And assuming that this judgment was not entered until March 29, the allowance of this appeal on April 30 was out of time.

It is contended that the subsequent formal order signed on March 31 by Judge Sweeney is the effective judgment. But the procedure in this District Court makes clear that such formal written orders are unnecessary. It is the simple docket entry which is the final decision or judgment of the court below.

Moreover, the circumstances surrounding the formal order of March 31 reveal no intention by Judge Sweeney to supersede the effect of the previous docket entry or to extend the time for appeal. The deputy clerk, in a letter written to the Department of Justice, has described the situation in these words:

"On or about March 31st, the Government presented a written order to me; and I accompanied the United States Attorney to Judge Sweeney's chambers. It was entirely new procedure for us to have a written order. I understand it was only because the United States represented that the Department of Justice wanted a written order in this case, so as to conform to the suggestion contained in Mr. Justice Jackson's concurring opinion in *United States* v. *Swift & Co.*, 318 U. S. 442, 446, that Judge Sweeney signed the order. I can recall that Judge Sweeney protested against the necessity of signing such an order when it was presented to him, but did sign it at the request of the United States Attorney. I also remember that Judge Sweeney said he was not going to adopt the practice of signing orders in all such future cases. When it came time to make an entry of this order in the books, I assumed that it was to take the place of the entry 'Sweeney, J. Indictment quashed', which was made between March 25th and March 29th, and I told the docket clerk making the entry to cross out the entry which had been made previously between March 25th and March 29th.

"When I wrote my letter to you, it seemed to me that I had told the Court that the entry of March 5 would necessarily be stricken out, but I find that the Court has no recollection of being so informed. There was no intention that the order of March 31 should extend the time for appeal, and it is the Court's recollection that he so stated to counsel.

"By direction of the Court, I am sending a copy of this letter to counsel for the defendant."

It thus clearly appears that the March 5 entry, which was actually made between March 25 and March 29, was intended to be the final decision or judgment of the District Court and that the appeal period began to run from the date of actual entry. The March 31 order was entered at the Government's insistance merely to conform to a suggestion of one Justice of this Court to the effect that "we would be greatly aided if the District Courts in dismissing an indictment would indicate in the order the ground, and, if more than one, would separately state and number them." *United States* v. *Swift & Co.*, 318 U. S. 442, 446. That order was thus no more than a clarification and reiteration of the March 5 judgment. It cannot be considered as a vacation of the prior judgment or as a new or amended judgment.

The very fact that Judge Sweeney stated that the March 31 order did not extend the time for appeal demonstrates his belief and intention that a valid final order had theretofore been entered. Some time after March 31 the deputy clerk on his own initiative ordered the March 5 docket entry stricken in the mistaken belief that it had been superseded. In its place was inserted the entry: "March 31. Sweeney, J. Order quashing indictment." Such action was obviously insufficient to change either Judge Sweeney's intention or the finality and effect of the March 5 entry for purposes of appeal to this Court.

Varying and uncertain rules governing criminal appeals are to be avoided whenever possible. Yet the effect of holding this appeal to be timely is to inject into the procedure of the court below an element of confusion and doubt. Heretofore parties to a criminal proceeding in the District Court of Massachusetts were entitled to rely on the docket entry, following an opinion granting a motion to quash, as the final decision or judgment. They could calculate appeal periods from the date of that entry. Now they must risk the possibility that at an undeterminable later date one of the parties will convince the court that a formal order should be entered and that the time for appeal will start from that date. No reason of law or policy suggests itself in support of such uncertainty.

Judged by the fixed and simple practice of the court below in entering its final judgments, this appeal cannot be considered timely.

Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE join in this dissent.